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CASES
ON
TRADE REGULATION

SELECTED FROM DECISIONS OF
ENGLISH AND AMERICAN COURTS

BY
HERMAN OLIPHANT

PROFESSOR OF LAW
IN COLUMBIA UNIVERSITY

AMERICAN CASEBOOK SERIES

WILLIAM REYNOLDS VANCE
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1923

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HERMAN OLIPHANT

ATTORNEY AT LAW

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(OLIPH. TRADE REG.)

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science.”

Turning to the case method Professor Redlich comments as follows:

“It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law.”

The general purpose and scope of this series were clearly stated in the original announcement:

“The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

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Trusts. By Thaddeus D. Kenneson, Professor of Law in the University of New York.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,
General Editor.

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CASES ON TRADE REGULATION

HISTORICAL INTRODUCTION

The study of the regulation of modern trade by law may be helpfully approached by considering some of the outstanding facts in the history of English trade, particularly the successive phases of the social control of that trade, whether such were manifested through governmental machinery, ecclesiastical organizations, or the voluntary associations of men in trade. Many of the modern judicial and executive devices for trade control are the outgrowth of those of mediæval England. Standards of conduct in trade prescribed by the law to-day have an eventful, but nevertheless unbroken, line of development reaching farther back than the Black Death. Most of our current philosophical notions as to the problem of the proper relation of government to business have been bidding for acceptance throughout the centuries. Probably most important is the fact, easily overlooked, that current trade, the thing to be regulated, and mediæval trade, are cross-sections of the same organism and display more likenesses than differences in basic matters of structure. Finally, it should be seen that our earliest and latest recorded experiments in trade control are really contemporary when viewed in proper perspective.

The time covered by these readings may be roughly divided into three periods: when such trade as there was eddied about the manor or village; when the town was the center of trade and the unit for its control; when trade became national in its organization and regulation.

1. **The Manorial Structure.**—The fundamental characteristic of the manorial group, regarded from the economic point of view, was its *self-sufficiency*, its social *independence*. The introduction of new tenants from outside was indeed always possible, either to take the place of villeins who had died without children, or to occupy portions of the demesne or waste. But it was probably very rare; the same families tilled the village fields from father to son. Each manor had its own law courts for the maintenance of order. Then, as now, every village had its church; with this advantage or disadvantage, whichever

it may be reckoned, as compared with modern times, that the priest did not belong to a different social class from his parishioners.

The village included men who carried on all the occupations and crafts necessary for everyday life. There was always a water mill or a windmill, which the tenants of the manor were bound to use, paying dues, which formed a considerable fraction of the lord's income. Again and again we find the lord's servants seizing the hand mills of which the tenants had dared to make use in detriment of his rights. For a long time the lords kept the mills in their own hands, under the care of bailiffs, making what profit they could thereby, but in the twelfth century it began to be the practice to let the mill to one of the villeins at an annual rent, or *ferm*. Many villages, though not all, had their own blacksmith, and carpenter, who probably were at first communal officers, holding land on condition of repairing the plows of the demesne and of the villagers; though in the course of the thirteenth and fourteenth centuries this service also came to be commuted for money, and the craftsman received pay for each piece of work. Another village officer, who sometimes appears as holding land in virtue of his office, was the pounder.

The village "general shop" had not yet come into existence; in many places it did not appear until the present century: partly because many of the wants which it meets were not yet felt, partly because such wants as were felt were supplied, either by journeys at long intervals to some distant fair or market, or by the labor of the family itself. The women wove rough linen and woolen cloth for clothing; the men tanned their own leather.

Thus the inhabitants of an average English village went on—year in, year out—with the same customary methods of cultivation, living on what they produced, and scarcely coming in contact with the outside world. The very existence of *towns*, indeed, implied that the purely agricultural districts produced more than they required for their own consumption; and corn and cattle were regularly sent, even to distant markets, by lords of manors and their bailiffs, in increasing quantities as the great lords or corporations came to desire money payments, instead of payments in kind. But the other dealings of the villagers with the outside world were very few. First, there was the purchase of *salt*, an absolute necessity in the mediæval world, when people lived on salted meats for five months in the year. Secondly, *iron* was continually needed for the plows and other farm implements. It was to be had, both of home manufacture, especially from the weald of Sussex, and of foreign importation, chiefly from Spain. A further need was felt when, at the end of the thirteenth century, a fresh disease, the scab, appeared among the sheep, and *tar* became of great importance as a remedy. It was produced in Norway, and exported by the Hanse merchants from Bergen to the Norfolk ports. In the years of murrain, the cost incurred under this head was a considerable item in the bailiff's expenses.

Perhaps the only regular recurring need, which the village could not itself supply, was that of *millstones*. Of these the better qualities came from the neighborhood of Paris, and were brought to the ports of the eastern and southern coasts, whither we often find the bailiff or miller journeying to purchase them.

Not only was the village group thus self-contained and complete within itself; the sense of unity was so strong that it was able to act as a corporate body. From early times the great lords, possessing manors at a distance which they could not easily inspect themselves or by their stewards, had let them for fourteen, twenty-one, or thirty-five years at a *ferm*, or fixed annual payment, to men who would take the place of the lord and try to make a profit. Now, we find many cases, even as early as 1183, in which the whole body of villeins, the *villata*, of particular manors made contracts with their lords identical with those, which an individual *fermer* might have made, promising an annual sum, and taking the management of the land into their own hands.¹

2. **The Origin of Towns.**—A great many of the towns grew up under the manorial patronage, so that their earlier history is really the story of a prosperous manor.

The manor has been spoken of as a center of rural employment. Towns must be regarded as centers of trade and commerce, and any social gathering or settlement, affording opportunities for trade, supplied a nucleus which might sooner or later develop into a town. The introduction of Christianity, and the struggle with the Danes, each brought about social conditions which favored their growth. Opportunities of trade were offered in Christian times at places of pilgrimage, especially on the days when the patron saint was commemorated, while the great Benedictine monasteries formed large establishments, which were often partially dependent on goods brought from a distance. Norwich and Canterbury, Bury, Reading, and Worcester are among the towns which have thus come into being under the shadow of a great abbey.

On the other hand, the forts, built by the Danes or erected by Edward the Elder, and his sister, the Lady of Mercia, to hold the country against the Danes, were also centers of trade, and the growth of such towns as Leicester and Tamworth may perhaps be traced to these causes. But so soon as active contest with the Danes had abated, and they were adopted as a constituent element on English soil, the progress of the towns was rapid. The Danes were given to seamanship and trade, as the English had ceased to be. They brought England into intercourse with their own settlements on the Baltic, in Iceland, and in Ireland. They seem to have devoted themselves to

¹ Reprinted by permission from Ashley, *An Introduction to English Economic History and Theory: The Middle Ages*, p. 33 et seq., passim. (Longmans, Green & Co., 1892.)

industrial pursuits and to have furnished some common articles of trade.

While these influences made it possible for town life to arise, there were various physical conditions which rendered one point or another especially favorable for the new development. The English rivers offer facilities for carriage far into the country, and more than one town has arisen at the point where the tide served to bring the small seagoing vessels of early days. Perth and Stirling in Scotland, Ipswich, Norwich, and Chester may all be regarded as illustrations in point. In other cases the great Roman roads remained to offer facilities of communication, and new towns took their rise in the immediate neighborhood, or on the very sites, of the Roman ruins.²

3. Towns and Trade.—The rise of the towns brought with it a new era in manufactures. In the ordinary village it did not pay men to specialize in the production of wares, as the market was so small. A shoemaker, for instance, could not make a living by selling 50 or 100 pairs of shoes a year. If we think, however, of a village growing into a town surrounded by a considerable country population, we see that the market has widened into an area of size sufficient to support a number of specialists. Manufacturing became a *profession* to which men devoted most of their time. A man could learn his trade much more thoroughly and could afford to make the tools which would enable him to exercise it most efficiently. The result was an increase in production which enabled the people in a given area to live far more comfortably than they had done before.

This movement was bound to change the conditions of life in the country districts. The people there were freed from the necessity of devoting part of their time to work which they never did well; they could apply most of their energy to agriculture, and could use the surplus crop which they thus obtained for a profitable exchange with the artisans of the town. The growth of towns affected them in another way. In the purely manorial period a serf could not better his condition by running away; he had nowhere to go, except to other manors like the one he had left, where his condition might be actually worse than before. In the towns, however, practically all the population were free; the artisans were numerous and intelligent enough to provide for their own protection, and did not need to subject themselves to a lord. The towns were islands of freedom in a sea of serfdom or half-freedom. The custom established itself that a serf who could escape from his lord, and who lived a year and a day within the walls of a town, became a freeman, and could not be reduced to his former condition. Landlords found that they must bid against the attractions of the town if they were to keep the laborers

² Reprinted by permission from Cunningham and McArthur, *Outlines in English Industrial History*, p. 46 et seq., passim. (1895. Copyrighted by the Macmillan Company.)

in the country, and agreed to lighten their burdens if they would stay. Many influences worked together, and the results were modified by many factors, especially of a political kind, in various countries, but the upward movement of the country population was general throughout Western Europe. Freemen produced more than serfs, and this was another influence increasing the surplus of the country districts, and furthering trade thereby.³

4. **The Gild Merchant.**—As the earliest history of the gild merchant is wrapped in obscurity, we must resort to conjecture. Whether we place the inception of the fraternity immediately before or after the Norman Conquest, whether we make it the continuation of older Anglo-Saxon gilds, or a derivative from Normandy, or a wholly new and spontaneous growth, it was doubtless at first merely a private society, unconnected with the town government, having for its object the protection of its members, the tradesmen of the borough, and the maintenance of the newly invigorated trade interests.

During the twelfth century it gradually became a recognized part of the town constitution, thus entering upon its second stage of development. How this came to pass can easily be realized from the later history of the English gilds in general. For in the fourteenth and fifteenth centuries a simple social-religious gild at times attained such power in a community that it came to be regarded as an important constituent element of the civic administration. Quite similar must have been the growth of the gild merchant, which from the outset was doubtless composed of the most influential burgesses, and which, as the exponent of the mercantile interests, must always have been greatly concerned in the increase of the privileges and prosperity of the borough in general. It was very natural that the town authorities should use such a society for public purposes, intrusting to it the surveillance of the trade monopoly in which its members were particularly interested, allowing it to gradually become an important part of the civic administrative machinery.

The beginning of the third and final stage of development cannot be definitely fixed, for in some places it was of an earlier date than in others. The fourteenth century may, in general, be called the period of gradual transition. In the fifteenth century the transformation was completed. In this and the following centuries the term "gilda mercatoria" became less and less frequent. In many places it soon wholly disappeared. Where it continued to subsist, the gild had no longer an individuality of its own. Its aldermen and other peculiar officers, its whole organization as a distinctive entity, had vanished. It had merged its identity in that of the general municipal organism. The head of the fraternity was now the head of the town; borough and gild, burgesses and gildsmen, were now identical. What had once

³ Reprinted by permission, from Day, *A History of Commerce*, p. 42 et seq. (Longmans, Green & Co., 1914.)

been a distinct integral part of the civic body politic became vaguely blended with the whole of it. The old gild merchant was now rarely mentioned in connection with the municipal trade restrictions and regulations, the latter being commonly applied to burgesses, craftsmen, freemen, or "foreigners."

We are particularly concerned with only one phase of this subject, namely, the relation of the craftsmen or artisans and their associations to the gild merchant. It is necessary at the outset to emphasize the fact that, generally speaking, craftsmen were freely admitted to the gild merchant in the twelfth, thirteenth, and fourteenth centuries. The term "merchant," as is well known, was not in those days confined to large dealers, but embraced all who traded. The line of demarcation between merchant and craftsmen was not yet sharply defined. Every master craftsman was regarded as a merchant, for he bought his raw materials, and sold the products of his handiwork in his shop or at his stall, just as some coopers, shoemakers, bakers, and other tradesmen still do at the present day. The glover bought his skins; the baker his corn; the butcher sold hides as well as meat; the weaver, fuller, and dyer bought wool and woad, and sold cloth; the tanner bought bark and hides, and sold leather. Craftsmen were not only admitted to the gild merchant, but also, in all probability, constituted the majority of its members.

Craft guilds are first mentioned during the reign of Henry I (1068-1135), about half a century after the first appearance of the gild merchant. The latter included merchants proper and artisans belonging to different trades; the craft gild, at first, included only artisans of a single trade. The position of these craft fraternities in the town community during the twelfth and thirteenth centuries was different from that of the gild merchant. They had not yet become official civic bodies, like the "gilda mercatoria," forming a part of the administrative machinery of the town. Their existence was merely tolerated in return for a yearly ferm paid to the crown, whereas the gild merchant constituted a valuable burghal privilege, whose continuance was guaranteed by the town charter. Still the craft guilds occupied a more important position in the community than that of a mere private association of to-day. For with the grant of a gild the craftsmen usually secured what in Germany was called the "Zunftzwang" and the "Innungsrecht"; i. e., the monopoly of working and trading in their branch of industry. The craftsmen thus associated remained in the common gild merchant; but the strength of the latter was weakened and its sphere of activity was diminished with every new creation of a craft fraternity, though these new bodies continued subsidiary to, and under the general regulation of, the older and larger fraternity. The greater the commercial and industrial prosperity of a town, the more rapidly did this process of subdivision into craft guilds proceed, keeping pace with the increased division of labour. In the smaller towns, in which agriculture continued a prominent element,

few or no crafts were formed; and hence the old gild merchant remained intact and undiminished in power longest in this class of boroughs.⁴

5. **The Craft Gild and the Labor Union.**—Now, the central figure of the gild organization, in all instances, and at all periods of its development, was the master craftsman owning the instruments of production, and selling the product. Opinions may differ as to the position of the journeymen in the gild or as to the extent of the prevalence of subordinate or semi-servile labour outside it. Different views may be entertained as to the reality of that regard for the interests of the consumer which forms the ostensible object of many gild ordinances. But throughout the whole range of gild history the master craftsman, controlling the processes and selling the products of the labour of his little industrial group, was the practical administrator of, and the dominant influence in, the gild system. In short, the typical gild member was not wholly, or even chiefly, a manual worker. From the first he supplied, not only whatever capital was needed in his industry, but also that knowledge of the markets for both raw material and product and that direction and control which are the special functions of the *entrepreneur*. The economic functions and political authority of the gild rested, not upon its assumed inclusion of practically the whole body of manual workers, but upon the presence within it of the real directors of industry of the time. In the modern trade union, on the contrary, we find, not an association of *entrepreneurs*, themselves controlling the processes of their industry, and selling its products, but a combination of hired wage-workers, serving under the direction of industrial captains who are outside the organization. The separation into distinct social classes of the capitalist and the brain worker on the one hand, and the manual workers on the other—the substitution, in fact, of a horizontal for a vertical cleavage of society—vitiates any treatment of the trade union as the analogue of the craft gild.

On the other hand, to regard the typical craft gild, as the predecessor of the modern employers' association or capitalist syndicate, would, in our opinion, be as great a mistake as to believe, with George Howell, that it was "early prototype" of the trade union.

It seemed a matter of course to the statesmen, no less than to the public, that the leading master craftsmen of the town should be intrusted with the power and the duty of seeing that neither themselves nor their competitors were permitted to lower the standard of production. "The Fundamental Ground," says the petition of the Carpenters' Company in 1681, "of Incorporating Handicraft Trades and Manual Occupations into distinct Companies was to the end that all Persons using such Trades should be brought into one Uniform

⁴ Reprinted by permission from Gross, *The Gild Merchant*, I, p. 158 et seq., 107 et seq. (The Clarendon Press, 1890.)

Government and Corrected and Regulated by Expert and Skillful Governors, under certain Rules and Ordinances appointed to that purpose." The leading men of the gild became, in effect, officers of the municipality, charged with the protection of the public from adulteration and fraud. When, therefore, we remember that the craft gild was assumed to represent, not only all the grades of producers in a particular industry, but also the consumers of the product, and the community at large, the impossibility of finding, in modern society, any single inheritor of its multifarious functions will become apparent. The powers and duties of the mediæval gild have, in fact, been broken up and dispersed. The friendly society and trade union, the capitalist syndicate and the employers' association, the factory inspector and the poor law relieving officer, the school attendance officer, and the municipal officers who look after adulteration and inspect our weights and measures—all these persons and institutions might, with equal justice, be put forward as the successors of the craft gild.

The fundamental purpose of the trade union is the protection of the standard of life—that is to say, the organized resistance to any innovation likely to tend to the degradation of the wage-earners as a class. That some social organization for the protection of the standard of life was necessary was a leading principle of the craft gild, as it was, in fact, of the whole mediæval order. "Our forefathers," wrote the Emperor Sigismund in 1434, "have not been fools. The crafts have been devised for this purpose: That everybody by them should earn his daily bread, and nobody shall interfere with the craft of another. By this the world gets rid of its misery, and every one may find his livelihood." But in this respect the trade union does not so much resemble the craft gild, as reassert what was once the accepted principle of mediæval society, of which the gild policy was only one manifestation. We do not wish, in our historical survey of the trade union movement, to enter into the far-reaching controversy as to the political validity either of the mediæval theory of the compulsory maintenance of the standard of life, or of such analogous modern expedients as collective bargaining on the one hand, or factory legislation on the other. Nor do we wish to imply that the mediæval theory was at any time so effectively and so sincerely carried out, as really to secure to every manual worker a comfortable maintenance. We are concerned only with the historical fact that, as we shall see, the artisans of the seventeenth and eighteenth centuries sought to perpetuate those legal or customary regulations of their trade which, as they believed, protected their own interests. When these regulations fell into disuse, the workers combined to secure their enforcement. When legal redress was denied, the operatives, in many instances, took the matter into their own hands, and endeavored to maintain, by trade union regulations, what had once been prescribed by law.

In this respect, and practically in this respect only, do we find any trace of the gild in the trade union.⁵

6. The Black Death and Its Effects.—During the earlier mediæval centuries the most marked characteristic of society was its stability. Institutions continued with but slight changes during a long period. With the middle of the fourteenth century changes become more prominent. Some of the most conspicuous of these gather around a series of attacks of epidemic disease during the latter half of the century.

From the autumn of 1348 to the spring of 1350 a wave of pestilence was spreading over England from the southwest, northward and eastward, progressively attacking every part of the country. The disease was new to Europe. Its course in the individual case, like its progress through the community, was very rapid. The person attacked either died within two or three days, or even less, or showed signs of recovery within the same period. The portion of cases which resulted fatally was extremely large; the infectious character of the disease quite remarkable. It was, in fact, an extremely violent epidemic attack, the most violent in history, of the bubonic plague, with which we have unfortunately become again familiar within recent years.

From much careful examination of several kinds of contemporary evidence it seems almost certain that, as each locality was successively attacked in 1348 and 1349, something like a half of the population died. In other words, whereas in an ordinary year at that time perhaps one-twentieth of the people died, in the plague year one-half died. In 1361, 1368, and 1396 attacks are noticed as occurring more or less widely through the country, but none were so extensive as that which is usually spoken of as the "Black Death" of 1348-1349.

Such an extensive and sudden destruction of life could not take place without leaving its mark in many directions. Monasteries were depopulated, and the value of their property and the strictness of their discipline diminished. The need for priests led to the ordination of those who were less carefully prepared and selected. The number of students at Oxford and Cambridge was depleted; the building and adornment of many churches suspended. The war between England and France, though promptly renewed, involved greater difficulty in obtaining equipment, and ultimately required new devices to meet its expense. Many of the towns lost numbers and property that were never regained, and the distribution of population throughout England was appreciably changed.

After the Black Death the same demesne lands were to be cultivated, and in most cases the larger holdings remained or descended or

⁵ Reprinted by permission, from Sidney and Beatrice Webb, "The History of Trade Unionism," Revised Edition, p. 16 et seq., passim. (Longmans, Green & Co., 1920.)

were regranted to those who would expect to continue their cultivation. Thus the demand for laborers remained approximately as great as it had been before. The number of laborers, on the other hand, was vastly diminished. They were therefore eagerly sought for by employers. Naturally they took advantage of their position to demand higher wages, and in many cases combined to refuse to work at the old accustomed rates. A royal ordinance of 1349 states that, "because a great part of the people, especially the workmen and servants, have lately died in the pestilence, many, seeing the necessity of masters and great scarcity of servants, will not serve unless they may receive excessive wages." A contemporary chronicler says that "laborers were so elated and contentious that they did not pay any attention to the command of the king, and if anybody wanted to hire them he was bound to pay them what they asked, and so he had his choice either to lose his harvest and crops or give in to the proud and covetous desires of the workmen." Thus, because of this rise in wages, at the very time that many of the usual sources of income of the lords of manors were less remunerative, the expenses of carrying on their farming operations were largely increased.

The change which showed itself most promptly, the rise in the prevailing rate of wages, was met by the strenuous opposition of the law. In the summer of 1349, while the pestilence was still raging in the north of England, the king, acting on the advice of his council, issued a proclamation to all the sheriffs and the officials of the larger towns, declaring that the laborers were taking advantage of the needs of their lords to demand excessive wages, and prohibiting them from asking more than had been due and accustomed in the year before the outbreak of the pestilence or for the preceding five or six years. Every laborer, when offered service at these wages, must accept it; the lords of manors having the first right to the labor of those living on their manors, provided they did not insist on retaining an unreasonable number. If any laborers, men or women, bond or free, should refuse to accept such an offer of work, they were to be imprisoned till they should give bail to serve as required. Commissioners were then appointed by the king in each county to inquire into and punish violations of this ordinance.

When Parliament next met, in February, 1351, the Commons sent a petition to the king, stating that his ordinance had not been obeyed, and that the laborers were claiming double and treble what they had received in the years before the pestilence. In response to the petition what is usually called the "first Statute of Laborers" was enacted. It repeated the requirement that men must accept work when it was offered to them, established definite rates of wages for various classes of laborers, and required all such persons to swear twice a year before the stewards, bailiffs or other officials that they would obey this law. If they refused to swear or disobeyed the law, they were to be put in the stocks for three days or more, and then sent to the nearest

jail till they should agree to serve as required. It was ordered that stocks should be built in each village for this purpose, and that the judges should visit each county twice a year to inquire into the enforcement of the law. In 1357 the law was re-enacted, with some changes of the destination of the fines collected for its breach. In 1361 there was a further re-enactment of the law with additional penalties. If laborers will not work unless they are given higher wages than those established by law, they can be taken and imprisoned by lords of manors for as much as fifteen days, and then be sent to the next jail to await the coming of the justices. If any one, after accepting service, leaves it, he is to be arrested and sued before the justices. If he cannot be found, he is to be outlawed, and a writ sent to every sheriff in England, ordering that he should be arrested, sent back, and imprisoned till he pays fine and makes amends to the party injured; "and besides for the falsity he shall be burnt in the forehead made and formed to this letter F in token of Falsity, if the party aggrieved shall ask for it." This last provision, however, was probably intended as a threat rather than an actual punishment, for its application was suspended for some months, and even then it was to be inflicted only on the advice of the judges, and the iron was to remain in the custody of the sheriff. The statute was re-enacted with slight variations thirteen times within the century after its original introduction, namely, in addition to the dates already mentioned, in 1362, 1368, 1378, 1388, 1402, 1406, 1414, 1423, 1427, 1429, and 1444.⁶

7. The Church and Trade.—The teaching of the Gospel as to worldly goods had been unmistakable. It had repeatedly warned men against the pursuit of wealth, which would alienate them from the service of God and choke the good seed. It had in one striking instance associated spiritual perfection with the selling of all that a man had that he might give it to the poor. It had declared the poor and hungry blessed, and had prophesied woes to the rich. Instead of anxious thought for the food and raiment of the morrow, it had taught trust in God; instead of selfish appropriation of whatever a man could obtain, a charity which gave freely to all who asked. And in the members of the earliest Christian church it presented an example of men who gave up their individual possessions and had all things in common.

We cannot wonder that, with such lessons before them, a salutary reaction from the self-seeking of the pagan world should have led the early Christian Fathers to totally condemn the pursuit of gain. It took them further—to the denial to the individual of the right to do what he liked with his own, even to enjoy in luxury the wealth he possessed. The highest moral and legal philosophy of the ancient

⁶ Reprinted by permission from Cheyney, *An Introduction to the Industrial and Social History of England*, p. 86 et seq. passim. (1921. Copyrighted by the Macmillan Company.)

world strengthened this purely religious feeling, by bringing to its aid the doctrine of a "law of nature."

Such was the general character of the teaching of the church on economic matters during the early Middle Ages. The condition of Western Europe, long after the establishment of the Teutonic kingdoms, was such that it could do but little harm, and probably did great good. It could do little harm, because there was scarcely any commerce, and such commerce as there was was directed to the supply of articles of luxury for princes and nobles. The condemnation of trade, therefore, if, indeed, the clergy continued to repeat it, might weigh hardly upon individuals, but did not impede any useful circulation of goods. And by stimulating the clergy to rebuke the greed and violence of the powerful, by creating a public opinion on the side of contentment and charity, the teachings of the church on worldly goods could not fail to be beneficial.

In the eleventh century began a great moving of the stagnant waters. The growth of towns, the formation of merchant bodies, the establishment of markets—even if they did no more than furnish the peasant and the lord of the manor with a demand for their surplus produce, brought men face to face with one another as buyer and seller in a way they had not been before. But they did more; they prepared the way for the growth of a new class, a class of craftsmen, who could exist only on condition that they were able to sell their manufactures. At the same time, new needs for money appeared both in the crusades and in the passion for church building, which the religious revival of the tenth century brought with it. Hence economic questions, especially such as concerned the relations of seller and buyer, of creditor and debtor, became of the first importance.

With these new dangers before them, churchmen began once more to turn their attention to economic matters, and to meet what they regarded as the evil tendencies of the Roman law, "the principle of the world," by a fresh application of Christian principles. On two doctrines especially did they insist: That wares should be sold at a just price, and that the taking of interest was sinful. They enforced them from the pulpit, in the confessional, in the ecclesiastical courts; and we shall find that by the time that the period of legislative activity on the part of the secular power begins, these two rules had been so impressed on the consciences of men that Parliament, municipality, and guild endeavored of their own motion to secure obedience to them.

Now, speaking generally, it may be said that during the period from the eleventh to the fourteenth century there was but a very small field for the investment of capital. In the trading centers there were, indeed, during the latter part of that period, occasional opportunities for a man to take part in a commercial venture, and no obstacle was put by the church or public opinion to a man's investing his money in this way, when no definite interest was stipulated for, but he became a bona fide partner in the risk as well as the gain. But such oppor-

tunities were still rare. We must not forget that England was almost entirely an agricultural country, and that its agriculture was carried on under a customary system which gave little opportunity for the investment of capital. Even in the rising manufactures of the time there was little room for "enterprise" or "extension of business"; the demand was too small, the available workmen too few, for any such rapid increase in production as we are nowadays familiar with. Under such circumstances, when money was borrowed, it was usually to meet some sudden stress of misfortune, or for "unproductive" expenditure; e. g., by a knight to go on a crusade, or by a monastery to build a church.

In some cases like these it seemed unjust that a person possessing money, which he could put to no productive use himself, should make gain out of the necessities or piety of another. Ample security was usually given for the return of the money lent; and as the alternative to lending was that the money remained idle in the hands of its possessor, he was in just the same position when his money came back to him as if he had never parted with it. Surely, under these circumstances, we cannot blame the moralists, who thought that the evils of usury were so great that they did well to prohibit the payment of interest altogether. And such an opinion was likely to be strengthened by the grievous results before their eyes of such usury as was permitted, that exercised by the Jews.

We must, however, notice the application of the prohibition to cases other than money loans. The repayment of a loan together with usury in money had, of course, been the first subject of prohibition; but even the Fathers of the fourth and fifth centuries had rebuked those who pretended that usury consisted only in taking *money* reward. "If you lend money to a man, expecting to receive more than you have given, whether it is in money or in corn, wine, oil, or anything else, you are a usurer," says St. Augustine.

The transition was easy from usury, strictly so called, to usurious practices in ordinary trade. Thus all payment of money in return for *the giving of credit*—all bargains in which goods were sold at a price higher than their real value in consideration of the seller's having to wait some time before he was paid—were deemed usurious; for it was the same as if the seller were to charge usury for lending the goods themselves, or the amount of money which was the just price of the goods, to the buyer, for the period during which the seller waited for payment.

It is easy to see how the theory of usury, when it had been developed to this point, would come to be interwoven with the theory of just price, until the one could in many doubtful cases be brought to strengthen the other.⁷

⁷ Reprinted by permission from Ashley, *An Introduction to English Economic History and Theory: The Middle Ages*, p. 126 et seq., passim. (Longmans, Green & Co., 1892.)

8. **Governmental Regulation of Trade.**—The public authorities were not content with having thus provided society with mere instruments of exchange; with the growing trade of the thirteenth century they felt themselves bound to regulate every sort of economic transaction in which individual self-interest seemed to lead to injustice. This regulation was guided by the general principle that a *just* or *reasonable price* only should be paid, and only such articles sold as were of good quality and correct measure. Most of the enactments and rules were aimed at preventing some particular form of fraud, usually in some particular article; and no hard and fast line can be drawn between the action of the central authority and that of local authorities of town or gild. Still, some of the regulations were of the nature of general rules of trade; and some commodities were felt to be of such general importance as to make it necessary for the government to give special attention to them.

The rules of most far-reaching consequence were those prohibiting the allied practices of *forestalling*, *engrossing*, and *regrating*—terms which came later to have each a separate meaning, but in the thirteenth and fourteenth centuries seem to have been used almost as synonymous for any action which prevented goods from being brought by the producer or bona fide merchant to open market; the forestaller or engrosser buying them wholesale, either outside the town or in the market itself, and then securing, by means of monopoly, a higher price than would otherwise have been paid.

Among other methods of forestalling, ordinances of the same period especially mention those who buy wares in a town before the hour fixed for the opening of the market; and those in ports who go out to ships laden with merchandise as they enter and “do buy the merchandise in gross and then do sell them at greater and dearer prices than the first merchants would do, to the grievance of the common people.” In the later years of Edward III the prohibition of forestalling was again and again renewed by statute.

The prohibition, it is clear from the wording of the statutes, had primary reference to those who endeavored to secure local and temporary monopolies of the supply of food, especially of corn, though it was wide enough to cover all similar attempts with other wares. During the Middle Ages it may be said that economic conditions were such that individuals could, if unrestrained, control or get into their power the supply of commodities. It must be remembered that the supply, in the case of corn and other foodstuffs, was necessarily a local one. Then came centuries during which supply was furnished from so many directions that individuals could not control it. At the present time, with the increasing centralization of business and facility of communication, it seems to be again becoming possible for individuals to control the supply, not, as in the fourteenth century, of a town only, but of the civilized world. And if such attempts succeed, we may

come to look upon mediæval legislation with somewhat more sympathy.

The town magistrates, indeed, were not less anxious than were Parliament and the ministers to keep the trade in articles of food under due control. Besides carrying out the assizes of bread, ale, and wine, they issued ordinances regulating the prices of poultry and fish, appointing the markets at which each sort of food was to be sold, and providing for their supervision. Accounts of punishments inflicted on persons selling unwholesome food form a very considerable part of the town records.

Among craftsmen, some were more than others subject to regulation by the town magistrates. They were such as had no fixed shops, but moved about from place to place to perform particular pieces of work, "carpenters, masons, plasterers, daubers, tilers, and the servants of such."

There were, however, but few other cases in which the municipal authorities attempted to regulate wages or prices before the middle of the fourteenth century. It will be well, for the present, to confine ourselves to the period preceding the Black Death, and to leave the question of what effect that calamity had upon industrial policy to a later section. No doubt the town magistrates claimed the right to regulate wages when they thought proper, and this right they occasionally exercised; e. g., in London, to regulate blacksmiths' charges for shoeing horses. This was a matter in which a traveler in a hurry might be at the mercy of a blacksmith. So also the charges to be made by curriers and leather dressers were limited. But, as a rule, the price of manufactured goods seems to have been left to be determined by the rules of the guilds; the limitation in London of the price of spurs by civic ordinance is an almost solitary example to the contrary. Unfortunately, we have too little evidence to be able to speak with confidence as to how the guilds regulated prices. In many crafts the artisan did not purchase the material himself, but received it from a customer to be made up, and received a payment for his service. These payments in each craft were doubtless fixed by custom and common consent, and overcharges seem to have been punished.⁸

9. Mediæval Versus Modern Trade Conditions.—In comparing the condition of trade and industry inside the town with those of the present day, very wide differences appear. Commonplaces of this century, such as capital, labor, employer, competition, have very little meaning as applied to the thirteenth century. Employer and laborer are one; the craftsman works at his craft, assisted by apprentices, who will, in their turn, become craftsmen; the retail shop is practically unknown, for each craftsman sells the goods he makes; there is little change in fashion, and demand is steady; large stocks are not made or held; there is no underselling or cutting out of rivals by improved

⁸ Id. p. 181 et seq., *passim*.

process or specious goods; there are no wealthy employers, struggling to become still wealthier. On the contrary, townsmen live much the same lives and aim at standing well with their gild rather than exciting envy by their individual prosperity. Craftsmen work year after year by the same method on the same materials. It is not competition which determines price, but usage and regulation. The price of any ware is to be a fair price, fair to the producer and fair to the buyer, and this was far more easy to estimate than it is now. Under the diverse conditions of modern production, the idea of justice as a determining factor of price has gone; we do not trouble over what is the right price; we accept the price under usual conditions as being right. But when craftsmen lived similar lives, and produced on a similar scale, with similar advantages of market and situation, and with similar costs of production, a just price was not so difficult to determine. Thus the trade of the time is pervaded with a morality that is unfamiliar to our day. Now, trade is not immoral, but it is unmoral; price is left to competition, to the conditions of the market. But in the thirteenth century current opinion, if not perhaps on so high a level as St. Thomas Aquinas would have had it, when he urged the wickedness of selling defective articles without indicating the defects to the buyer, or of asking a high price when there was a temporary scarcity, yet made strongly against deceit, fraud and concealment. Neither buyer nor seller was to take advantage of the other's necessities, but payment was to be a fair return for the labour expended upon honest work.⁹

10. The Decay of the Gilds.—Changes in town life occurred during this period (1403–1603) corresponding quite closely to the enclosures and their results in the country. These consisted in the decay of the gilds, the dispersion of certain town industries through the rural districts, and the loss of prosperity of many of the old towns. In the earlier craft gilds each man had normally been successively an apprentice, a journeyman, and a full master craftsman, with a little establishment of his own and full participation in the administration of the fraternity. There was coming now to be a class of artisans who remained permanently employed, and never attained to the position of master craftsman. This was sometimes the result of a deliberate process of exclusion on the part of those who were already masters. In some trades the masters required apprentices at the time of indenture to take an oath that they would not set up independent establishments when they had fulfilled the years of their apprenticeship, a custom which was forbidden by Parliament in 1536. In other cases it was no doubt the lack of sufficient capital and enterprise which kept a large number of artisans from ever rising above the class of journeymen.

⁹ Reprinted by permission from Warner, *Landmarks in English Industrial History*, p. 60 et seq. (Blackie & Son, Limited, 1912.)

Under these circumstances the journeymen evidently ceased to feel that they enjoyed any benefits from the organized crafts, for they began to form among themselves what are generally described as "yeomen gilds" or "journeymen gilds." At first the masters opposed such bodies, and the city officials supported the old companies, by prohibiting the journeymen from holding assemblies, wearing a special livery, or otherwise acting as separate bodies. Ultimately, however, they seem to have made good their position, and existed in a number of different crafts in more or less subordination to the organizations of the masters. The first mention of such bodies is soon after the Peasant's Rebellion, but in most cases the earliest rise of a journeyman gild in any industry was in the latter part of the fifteenth or in the sixteenth century. They were organizations quite similar to the older bodies from which they were a split, except that they had, of course, no general control over the industry.

Among the masters also changes were taking place in the same direction. Instead of all master artisans or tradesmen in any one industry holding an equal position and taking an equal part in the administration of affairs of the craft, there came, at least in some of the larger companies, to be quite distinct groups usually described as those "of the livery" and those "not of the livery." The expression no doubt arose from the former class being the more well-to-do and active masters, who had sufficient means to purchase the suits of livery worn on state occasions, and who in other ways were the leading and controlling members of the organization. This came, before the close of the fifteenth century, in many crafts to be a recognized distinction of class or station in the company. Those of the livery controlled the policy of the gild, to the exclusion of the less conspicuous members, even though these were also independent masters with journeymen and apprentices of their own.

But the practical administration of the affairs of the wealthier companies came in many cases to be in the hands of a still smaller group of members. This group was often known as the "Court of Assistants," and consisted of some twelve, twenty, or more members who possessed higher rights than the others, and, with the wardens or other officials, decided disputes, negotiated with the government or other authorities, disposed of the funds, and in other ways governed the organized craft or trade.

Thus before the close of the sixteenth century the craft and trading organizations had gone through a very considerable internal change. In the fourteenth century they had been bodies of masters of approximately equal position, in which the journeymen participated in some of the elements of membership, and would for the most part in due time become masters and full members. Now, the journeymen had become for the most part a separate class, without prospect of master-ship. Among the masters themselves a distinct division between the

more and the less wealthy had taken place, and an aristocratic form of government had grown up which put the practical control of each of the companies in the hands of a comparatively small, self-perpetuating ruling body. These developments were all the more marked, possibly some of them were only true, in the case of the London companies.

The changes described above were, as has been said, the result of development from within the craft and trading organizations themselves, resulting probably in the main from increasing wealth. There were other contemporary changes in these companies, which were rather the result of external influences. One of these external factors was the old difficulty which arose from artisans and traders who were not members of the organized companies. There had always been men who had carried on work surreptitiously outside of the limits of the authorized organizations of their respective industries. They had done this from the inability or unwillingness to conform to the requirements of gild membership, or from a desire to obtain more employment by underbidding in price, or additional profit by using unapproved materials or methods. Most of the bodies of ordinances mention such workmen and traders; men who have not gone through a regular apprenticeship, "foreigners" who have come in from some other locality and are not freemen of the city where they wish to work, irresponsible men, who will not conform to the established rules of the trade. This class of persons was becoming more numerous through the fifteenth and sixteenth centuries, notwithstanding the efforts of the gilds, supported by municipal and national authority. The prohibition of any workers setting up business in a town unless they had previously obtained the approval of the officials of their trade was more and more vigorous in the later ordinances; the fines imposed upon masters who engaged journeymen who had not paid the dues, newcomers into the town, were higher. The complaints of the intrusion of outsiders were more loud and frequent. There was evidently more unsupervised, unregulated labor.

But toward the end of the fifteenth century this rural labor received a new kind of encouragement and a corresponding extension far beyond anything before existing. A class of merchants or manufacturers arose, who are spoken of as "clothiers," or "merchant clothiers," who bought the wool or other raw material, and gave it out to carders or combers, spinners, weavers, fullers, and other craftsmen, paying them for their respective parts in the process of manufacture, and themselves disposing of the product at home or for export. The clothiers were in this way a new class of employers, putting the master weavers or other craftsmen to work for wages. The latter still had their journeymen and apprentices, but the initiative in their industry was taken by the merchants, who provided the raw material and much of the money capital, and took charge of the sale of the completed goods. The craftsmen who were employed in this form of industry did not

usually dwell in the old populous and wealthy towns. It is probable that the restrictions of the gild ordinances were disadvantageous both to the clothiers and to the small master craftsmen, and that the latter, as well as journeymen who had no chance to obtain an independent position, now that the town craft organizations were under the control of the more wealthy members, were very ready to migrate to rural villages. Thus, in so far as the weaving industry was growing up under the management of the employing clothiers, it was slipping out from under the control of the town gilds by its location in the country. The same thing occurred in other cases even without the intermediation of a new employing class.

These changes, along with others occurring simultaneously, led to a considerable diminution of the prosperity of many of the large towns. They were not able to pay their usual share of taxation, the population of some of them declined, whole streets or quarters, when destroyed by fire or other catastrophe, were left unbuilt and in ruins. Certain new towns, it is true, were rising into greater importance, and certain rural districts were becoming populous with this body of artisans whose living was made partly by their handicraft, partly by small farming. Nevertheless the old city craft organizations were permanently weakened and impoverished by thus losing control of such a large proportion of their various industries. The occupations which were carried on in the country were pursued without supervision by the gilds. They retained control only of that part of industry which was still carried on in the towns.

Internal divisions and external changes in the distribution of industry were therefore alike tending to weaken the gild organization. It had to suffer also from the hostility of intrusion of the national government. Much of the policy of the government tended, it is true, as in the case of the enclosures, to check the changes in progress, and thus to protect the gild system. It has been seen that laws were passed to prohibit the exclusion of apprentices and journeymen from full membership in the crafts. As early as 1464 a law was passed to regulate the growing system of employment of craftsmen by clothiers. This was carried further in a law of 1511, and further still in 1551 and 1555. The manufacture of rope in the country parts of Dorsetshire was prohibited and restricted to the town of Bridport in 1529; the cloth manufacture, which was growing up through the "hamlets, thorps, and villages" in Worcestershire, was forbidden in 1553 to be carried on except in the five old towns of Worcester, Evesham, Droitwich, Kidderminster, and Bromsgrove; in 1543 it was enacted that coverlets were not to be manufactured in Yorkshire outside the city of York, and there was still further legislation in the same direction. Numerous acts were also passed for the purpose of restoring the populousness of the towns. There is, however, little reason to believe that these laws had much more effect in preventing the narrowing of the control of the gilds and the scattering of industries from the towns to the coun-

try than the various laws against enclosures had, and the latter object was practically surrendered by the numerous exceptions to it in laws passed in 1557, 1558, and 1575. All the laws favoring the older towns were finally repealed in 1623.

Another class of laws may seem to have favored the craft organizations. These were the laws regulating the carrying on of various industries, in some of which the enforcement of the laws was intrusted to the gild authorities. The statute book during the sixteenth century is filled with laws "for the true making of pins," "for the making of friezes and cottons in Wales," "for the true currying of leather," "for the making of iron gads," "for setting prices on wines," for the regulation of the coopers, the tanners, the makers of woolen cloth, the dyers, the tallow chandlers, the saddlers and girdlers, and dozens of other occupations. But although in many of these laws the wardens of the appropriate crafts were given authority to carry out the requirements of the statute, either of themselves or along with the town officials or the justices of the peace, yet, after all, it is the rules established by government that they are to carry out, not their own rules, and in many of the statutes the craft authorities are entirely ignored. This is especially true of the "Statute of Apprentices," passed in the fifth year of the reign of Queen Elizabeth, 1563. This great industrial code, which remained on the statute book for two hundred and fifty years, being repealed only in 1813, was primarily a re-enactment of the statutes of laborers, which had been continued from time to time ever since their introduction in 1349. It made labor compulsory and imposed on the justices of the peace the duty of meeting in each locality once a year to establish wages for each kind of industry. It required a seven years' apprenticeship for every person who should engage in any trade; established a working day of twelve hours in summer and during daylight in winter; and enacted that all engagements, except those for piece work, should be by the year, with six months' notice of a close of the contract by either employer or employee. By this statute all the relations between master and journeyman and the rules of apprenticeship were regulated by the government instead of by the individual craft gilds. It is evident that the old trade organizations were being superseded in much of their work by the national government. Freedom of action was also restricted by the same power in other respects also. As early as 1436 a law had been passed, declaring that the ordinances made by the gilds were in many cases unreasonable and injurious, requiring them to submit their existing ordinances to the justices at Westminster, and prohibiting them from issuing any new ones until they had received the approval of these officials. There is no indication of the enforcement of this law. In 1504, however, it was re-enacted with the modification that approval might be sought from the justices on circuit. In 1530 the same requirement was included in the law already referred to prohibiting excessive entrance fees. As the independent legislation of the gilds for their industries was already

much restricted by the town governments, their remaining power to make rules for themselves must now have been very slight. Their power of jurisdiction was likewise limited by a law passed in 1504, prohibiting the companies from making any rule forbidding their members to appeal to the ordinary national courts in trade disputes.

But the heaviest blow to the gilds on the part of the government came in 1547, as a result of the Reformation. Both the organizations formed for the control of the various industries, the craft gilds, and those which have been described as nonindustrial, social, or religious gilds, had property in their possession which had been bequeathed or given to them by members on condition that the gild would always support or help to support a priest, should see that mass was celebrated for the soul of the donor and his family, should keep a light always burning before a certain shrine, or for other religious objects. These objects were generally looked upon as superstitious by the reformers who became influential under Edward VI, and in the first year of his reign a statute was passed which confiscated to the crown, to be used for educational or other purposes, all the property of every kind of the purely religious and social gilds, and that part of the property of the craft gilds which was employed by them for religious purposes. One of the oldest forms of voluntary organization in England therefore came to an end altogether, and one of the strongest bonds which had held the members of the craft gilds together as social bodies was removed. After this time the companies had no religious functions, and were besides deprived of a considerable proportion of their wealth. This blow fell, moreover, just at a time when all the economic influences were tending toward their weakening or actual disintegration. Thus the gilds lost the unity of their membership, were weakened by the growth of industry outside of their sphere of control, superseded by the government in many of their economic functions, deprived of their administrative, legislative, and jurisdictional freedom, robbed of their religious duties and of the property which had enabled them to fulfill them, and no longer possessed even the bond of their dramatic interests. So the fraternities which had embodied so much of the life of the people of the towns during the thirteenth, fourteenth, and fifteenth centuries now came to include within their organizations fewer and fewer persons and to affect a smaller and smaller part of their interests. Although the companies continued to exist into later times, yet long before the close of the period included in this chapter they had become relatively inconspicuous and insignificant.

11. Paternal Government.—In many of the changes which have been described in this chapter, the share which government took was one of the most important influences. In some cases, as in the laws against enclosures, against the migration of industry from the towns to the rural districts, and against usury, the policy of king and Parliament was not successful in resisting the strong economic forces

which were at work. In others, however, as in the oversight of industry, in the confiscation of the property of the guilds devoted to religious uses, in the settlement of the relations between employers and employees, in the control of foreign commerce, the policy of the government really decided what direction changes should take.

As has been seen in this chapter, after the accession of Henry VII there was a constant extension of the sphere of government till it came to pass laws upon and provide for and regulate almost all the economic interests of the nation. This was a result, in the first place, of the breaking down of those social institutions which had been most permanent and stable in earlier periods. The manor system in the country, landlord farming, the manor courts, labor dues, serfdom, were passing rapidly away; the old type of guilds, city regulations, trading at fairs, were no longer so general; it was no longer foreigners who brought foreign goods to England to be sold, or bought English goods for exportation. When these old customs were changing or passing away, the national government naturally took charge, to prevent the threatened confusion of the process of disintegration. Secondly, the government itself, from the latter part of the fifteenth century onward, became abler and more vigorous, as has been pointed out in the first paragraph of this chapter. The Privy Council of the king exercised larger activities, and extended its jurisdiction into new fields. Under these circumstances, when the functions of the central government were being so widely extended, it was altogether natural that they should come to include the control of all forms of industrial life, including agriculture, manufacturing, commerce, internal trade, labor, and other social and economic relations. Thirdly, the control of economic and social matters by the government was in accordance with contemporary opinions and feelings. An enlightened absolutism seems to have commended itself to the most thoughtful men of that time. A paternalism which regulated a very wide circle of interests was unhesitatingly accepted and approved. As a result of the decay of mediæval conditions, the strengthening of national government, and the prevailing view of the proper functions of government, almost all economic conditions were regulated by the government to a degree quite unknown before. In the early part of the period this regulation was more minute, more intrusive, more evidently directed to the immediate advantage of government; but by the close of Elizabeth's reign a systematic regulation was established, which, while not controlling every detail of industrial life, yet laid down the general lines along which most of industrial life must run. Some parts of this regulation have already been analyzed. Perhaps the best instance and one of the most important parts of it is the Statute of Apprentices of 1563, already described. In the same year, 1563, a statute was passed making minute regulations for the fishing and fish-dealing trades. Foreign commerce was carried on by regulated companies; that is, companies having charters from the government, giving them a

monopoly of the trade with certain countries, and laying down at least a part of the rules under which that trade should be carried on. The importation of most kinds of finished goods and the exportation of raw materials were prohibited. New industries were encouraged by patents or other government concessions. Many laws were passed, of which that of 1571, to encourage the industry of making caps, is a type. This law laid down the requirement that every person of six years old and upward should wear on every Sunday and holy day a woolen cap made in England.

The conformity of manufactures to standard was enforced either by the officers of companies which were established under the authority of the government or by government officials or patentees, and many of the methods and materials of manufacture were themselves defined by statutes or proclamation. In agriculture, while the policy was less consistent, government regulation was widely applied. There were laws, as has been noted, forbidding the possession of more than two thousand sheep by any one landholder and of more than two farms by any one tenant; laws requiring the keeping of one cow and one calf for every sixty sheep, and the raising of a quarter of an acre of flax or hemp for every sixty acres devoted to other crops. The most characteristic laws for the regulation of agriculture, however, were those controlling the export of grain. In order to prevent an excessive price, grain raisers were not allowed to export wheat or other grain when it was scarce in England. When it was cheap and plenty, they were permitted to do so, the conditions under which it was to be allowed or forbidden being decided, according to a law of 1571, by the justices of the peace of each locality, with the restriction that none should be exported when the prevailing price was more than 1s. 3d. a bushel, a limit which was raised to 2s. 6d. in 1592.

Thus, instead of industrial life being controlled and regulated by town governments, merchant and craft guilds, lords of fairs, village communities, lords of manors and their stewards, or other local bodies, it was now regulated in its main features by the all-powerful national government.¹⁰

12. **The Period from 1600 to 1750.**—During the seventeenth and the first half of the eighteenth century there are no such fundamental changes in social organization to chronicle as during the preceding century and a half. During the first hundred years of the period the whole energy of the nation seems to have been thrown into political and religious contests. Later there was development and increase of production, but they were in the main an extension or expansion of the familiar forms, not such a change of forms as would cause any alteration in the position of the mass of the people. Much greater

¹⁰ Reprinted by permission from Cheney, *An Introduction to the Industrial and Social History of England*, 126 et seq., *passim*. (1921. Copyrighted by the Macmillan Company.)

skill in manufacturing was acquired, principally, as in earlier periods, through the immigration of foreign artisans.

There were also some inventions of new processes or devices for manufacture. These and other new industries, introduced by foreigners or developed by English inventors or enterprising artisans, added to the variety and total amount of English manufacture. The old established industries, like the old coarser woolen goods and linen manufacture, increased but slowly in amount and went through no great changes of method.

These industries, old and new, were in some cases regulated and supervised, as to the quality of wares and methods of manufacture, by the remaining guilds or companies, with the authority which they possessed from the national government. Indeed, there were within the later sixteenth and seventeenth centuries some new companies organized or old ones renewed especially for this oversight, and to guard the monopoly of their members over certain industries in certain towns. In other cases rules were established for the carrying on of a special industry, and a patent or monopoly was then granted by the king, by which the person or company was given the sole right to carry on the industry according to those rules, or to enforce the rules when it was carried on by other people. In still other industries a government official had the oversight and control of quality and method of manufacture. Much production, however, especially such as went on in the country, was not supervised at all, notwithstanding the intentions of the government.

Far the greater part of manufacturing industry in this period was organized according to the "domestic system," the beginnings of which have already been noticed within the previous period; that is to say, manufacturing was carried on in their own houses by small masters, with a journeyman and apprentice or two. Little or no organization existed among such small manufacturers, though their apprentices were of course supposed to be taken and their journeymen hired according to the provisions of the Statute of Apprentices, and their products were sometimes subjected to some governmental or other supervision.

Thus in manufacturing and artisan life, as in agricultural, the period was marked by an extension and increase of the amount of industry, on the same general lines as had been reached by 1600, rather than by any considerable changes.

The same thing is true of commerce, although its vast extension was almost in the nature of a revolution. As far back as the reign of Elizabeth most of the imports into England were brought in English vessels by English importers, and the goods which were exported were sent out by English exporters. The goods which were manufactured in scattered villages or town suburbs by the domestic manufacturers were gathered by these merchants and sent abroad in ever-increasing amounts. This trade was carried on largely by merchants

who were members of those chartered trading companies which have been mentioned as existing already in the sixteenth century. Some of these were "regulated companies"; that is, they had certain requirements laid down in their charters and power to adopt further rules and regulations, to which their members must conform. Others had similar chartered rights, but all their members invested funds in a common capital and traded as a joint-stock company. In both kinds of cases each company possessed a monopoly of some certain field of trade, and was constantly engaged in the exclusion of interlopers from its trade.

The foreign lands with which these companies traded furnished at the beginning of this period the only places to which goods could be exported and from which goods could be brought; but very soon the series of settlements of English colonists was begun, one of the principal inducements for which was that they would furnish an outlet for English goods. The "plantation of Ulster," or introduction of English and Scotch settlers into the north of Ireland between 1610 and 1620, was the beginning of a long process of immigration into that country. But far the most important plantations as an outlet for trade, as in every respect, were those made on the coast of North America and in the West Indies. These colonies were controlled by the English government largely for their commercial and other forms of economic value. The production of goods needed in England, but not produced there, such as sugar, tobacco, tar, and lumber, was encouraged, but the manufacture of such goods as could be exported from England was prohibited.

Closely connected with commerce and colonies as a means of disposing of England's manufactured goods and of obtaining those things which were needed from abroad was commerce for its own sake, for the profits which it brought to those engaged in it, and for the indirect value to the nation of having a large mercantile navy.

The most important provision for this end was the passage of the "Navigation Acts." By these laws all importation of goods into England from any ports of Asia, Africa, or America was forbidden, except in vessels belonging to English owners, built in England and manned by English seamen; and there was the same requirement for goods exported from England to those countries. The result of the policy of the Navigation Acts was to secure to English merchants and to English shipbuilders a monopoly of all the trade with the East Indies and Africa and with the American colonies, and to prevent the Dutch from competing with English merchants for the greater part of the trade with the continent of Europe.

The characteristics of English commerce in this period, therefore, were much the same as in the last. It was, however, still more completely controlled by English merchants and was vastly extended in amount. Moreover, this extension bid fair to be permanent, as it was largely brought about by the growth of populous English colo-

nies in Ireland and America, and by the acquisition of great spheres of influence in India.

The fabric of paternal government which we saw rising in the time of the Tudor sovereigns remained almost intact through the whole of this period. The regulation of the conditions of labor, of trade, of importation and exportation, of finance, of agriculture, of manufacture, in more or less detail, was part of the regular work of legislation or administrative action. Either in order to reach certain ulterior ends, such as government power, a large navy, or a large body of money within the country, or simply as a part of what were looked upon at the time as the natural functions of government, laws were constantly being passed, charters granted, treaties entered into, and other action taken by government, intended to encourage one kind of industry and discourage another, to determine rates of wages and hours of labor, prescribe rules for agriculture, or individual trades or forms of business, to support some kind of industry which was threatened with decay, to restrict certain actions which were thought to be disadvantageous, to regulate the whole economic life of the nation.

It is true that much of this regulation was on the books rather than in actual existence. It would have required a much more extensive and efficient civil service, national and local, than England then possessed, to enforce all or any considerable part of the provisions that were made by act of Parliament or ordered by the king in council. Again, new industries were generally declared free from much of the more minute regulation, so that enterprise where it arose was not so apt to be checked as conservatism where it already existed was apt to be perpetuated. Such regulation and control, moreover, were quite in accord with the feeling and with the economic and political theories of the time, so there was but little sense of interference or tyranny felt by the governed. A regulated industrial organization, slowly expanding on well-established lines, was as characteristic of the theory as it was of the practice of the period.¹¹

13. Industrial Revolution Defined.—The term "industrial revolution" was applied by Toynbee to the economic history of England between 1760 and 1830. Neither beginning nor end can be marked as definitely as with some political revolutions, but economic change during these years was sufficiently sudden and dramatic to justify the use of the term. The old order had not really been stationary, but change, as has been seen, had been, for a century and a half, abnormally slow. It now acquired suddenly unprecedented momentum. Again, whilst it is true that this momentum has gathered rather than lost force since 1830, the close of the revolution may be dated from that year. Men had begun to realize the extent and direction of the change

¹¹ Reprinted by permission from Cheney, *An Introduction to the Industrial and Social History of England*, 158 et seq., *passim*. (1921. Copyrighted by the Macmillan Company.)

which had come upon England, and were shaping ideas and policies conformable to the new conditions of life.¹²

14. **The Scope of the Industrial Revolution.**—At the close of the eighteenth and the opening of the nineteenth century a change, or rather a series of changes, passed over the agricultural and manufacturing industry of England, which has been aptly described by the name of the "industrial revolution." The changes which then took place were of considerable magnitude, and the conditions of industry, both in manufactures and in agriculture, may without any great extravagance be said to have been revolutionized.

Agriculture underwent a transformation, the chief part of which, however, seems to have been accomplished in the earlier half or two-thirds of the eighteenth century. Large farms began to take the place of small farms. The inclosure of the open field was actively prosecuted, and sometimes injustice was done to the rights of the smaller commoners. Scientific cultivation was substituted, in a more or less considerable degree, in different parts of the country, for primitive methods. Bakewell improved the breed of cattle. Townshend—"Turnip Townshend," as he was nicknamed—introduced the cultivation of the turnip. Coke at a later time devised an improved system of rotation of crops.

But in manufacturing industry the changes were more revolutionary, and they occurred in the latter part of the century. Four great inventions were made in the cotton industry—that of the spinning jenny, by Hargreaves; that of the water frame, by Arkwright; that of the mule, by Crompton; and, the most considerable and important, in its consequences to the old handicraft occupations, of all, that of the power loom, by Cartwright. This last invention dealt a fatal blow to the fortunes of the old hand loom weavers, and their distress has furnished a stock illustration of the temporary misery which may be occasioned by the introduction of machinery, at any rate to those workmen the labor of whose hands it supersedes. But other industries besides that of the manufacture of cotton were affected by the changes of the times. The smelting of iron by coal was introduced by Roebuck, the decaying iron industry revived, and the charcoal forests of Sussex were abandoned for the coal seams of the north and the Midlands. Canals, such as the Grand Trunk, connecting the Trent with the Mersey, and the Grand Junction, which afforded the means of communication between London and the chief towns of the Midlands, were constructed under the direction of the inventive genius of Brindley, and the roads of the country were improved under that of Telford. Mills were erected on the banks of rivers, in order that use might be made of the water power which was there available to drive the new machinery and then came the most wonderful and important

¹² Reprinted by permission from Meredith, *Outlines of the Economic History of England*, p. 231. (Sir Isaac Putman & Sons, Limited, 1908.)

discovery of all, that of the steam engine, to be followed in its turn by that of the railway.

All these changes gave a great stimulus to the production of wealth and the growth of population. They kindled a spirit of eager and restless enterprise, which was sometimes inclined to be reckless of injury occasioned to human life and health, and to give little consideration to the wrench to human affections which was not infrequently the consequence, direct or indirect, of the changes. For trade passed from quiet villages to noisy towns; from the home of the handicraftsman to the factory of the employer; from the master, who lived together with his apprentices and journeymen and was in general "so joined together" with them in "sentiment" and "love that they did not wish to be separated if they could help it," to the employer, who had hundreds of "hands" working under him whose very faces he might not himself know. Division and subdivision of labor, organization and localization of industry, were carried out on a scale and to an extent unknown before. Master merchants and wholesale dealers arose. Manufacturers began to produce for distant and fluctuating markets, and to crowd into, and dismiss from, their factories, as the changing demands of varying trade required, multitudes of men, women, and children. There seems to be reason for believing that something like a regular system of transporting children from London to the new manufacturing districts of the country was in operation, and there is unfortunately no doubt that the greed of parents joined with the eagerness of employers to increase the number and intensify the labor of the young apprentices in the factories. Population was stimulated by the lax administration of the poor law, and by the numerous chances of earning a livelihood which presented themselves, and was, so to say, torn up by the roots from its old abodes, while the industrial world was pervaded by a restless movement. The workmen were forbidden by law to combine with a view to the regulation of trade, but under the guise of friendly societies they formed themselves into trade unions, and attempted in certain trades to restore the old system, by which the number of apprentices was limited and the magistrates determined the rates of wages. They failed ultimately in this endeavor, but they did not cease to maintain, under circumstances of difficulty, their unions; and the state, by its Factory Acts, placed restrictions of increasing rigor and comprehensiveness on the employment of women and children. The industrial revolution was undoubtedly a time of great distress, which may have been increased by the Corn Laws, preventing the importation of food from abroad to make up for the scarcity occasioned by bad harvests at home, and by the depression of trade which followed the close of the great war. The financial demands of the war, combined with the opportunity afforded to England to supply the commercial wants of the continental nations, in whose country and by whose soldiers the war was chiefly prosecuted, to stimulate increased production, and the brilliant series

of inventions which were made toward the close of the last century, permitted the stimulus to be effective. The pressing need of the time seemed to be that of increased production.¹³

15. The Industrial Revolution in Its Broader Aspects.—Our historical sketch requires for its completion a study of that later aspect of social development which we so often and so strangely call the "industrial revolution." This movement has done far more than shower upon us a series of "great inventions" or bless mankind with a new technique. Appearing gradually and working indirectly, as well as directly, it has affected our whole world of thought, of action, and of institutions; it has modified our economics, our politics, our ethics, and even our religion; it has changed in nature, number, and form our baffling problems; it has written itself large in our culture. In view of its many-sidedness and the gradual way in which it has effected and is still effecting its changes, it seems amiss either to call it "industrial" or to refer to it as a "revolution."

We look in vain for its beginnings. We know that early mediævalism could have given us nothing which even erroneously, could be called an "industrial revolution." Before it could appear, the mediæval scheme of values had to be transformed. Desires for earthly things had to be freed from their unethical taint; a wholesome respect for the world had to be built up; man had to acquire greater reverence for his own powers and functions; people had to learn to conform to the things of this world if they would transform it. This change in the attitude toward life and its problems was intimately associated with several other lines of development. There appeared a new interest in nature, as nature, a new philosophy, a new mathematics, and a new physics. These laid the foundation of the new technique. Many discoveries of new lands were made, adding tremendous resources calling for utilization. There was brought to Europe gold alike serviceable for the furtherance of the new money economy and the more rapid accumulation of capital. Colonial ventures led to an extension of the market and a great increase in the size of the industrial unit. This necessitated a reorganization of the "factory" and a more extensive use of the principle of the division of labor. The last produced a minute specialization, which both served to create an incentive for the invention of new machines and furnished an opportunity for their use. Together with accumulated capital and the necessary scientific knowledge, this new organization led to the new technique. Even this is not the whole story; for in England the movement was hastened by conditions peculiar to the country. The indented coast line, by cheapening transportation and enlarging the market, must have been a factor of prominence. It has been suggested, too, that an institution, seemingly

¹³ Reprinted by permission from L. L. Price, "The Industrial Revolution," in *Palgrave's Dictionary of Political Economy*, II, 399 et seq., passim. (1910. Copyrighted by the Macmillan Company.)

as extraneous as primogeniture, played its part by forcing into mercantile pursuits those whose veins contained the adventurous blood of nobility.

The course of the "revolution" has been as comprehensive as its antecedents. The changes in technique are most clearly appreciated. Even here the tendency toward a "machine process," embracing a large part of the industrial system, is generally overlooked, as is also the seemingly antagonistic fact that up to the present the conquest of the older system by the machine has been partial and incomplete. On the economic side, the increasing importance of capital, the rise of the "factory system," the disappearance of "domestic industry," the trend toward large scale production, the separation of the laborer from the "tools of his trade," and increasing class differentiation based upon the differences in industrial function are most clearly seen. These aspects of the movement raise the questions of artificially controlling the tendencies inherent in the development of the machine system, the determination of the size of the industrial entity, the social control of large aggregates of wealth such as railroads and capitalistic monopolies, the elimination of economic insecurity which alike attends labor and capital, the equities of the distribution of wealth, and the urban enigmas of overcrowding, housing, sanitation, vice, and poverty. They reveal, too, just over the horizon, the more ominous questions of property, inheritance, and the reconstruction of industrial society.

The questions reveal but a single aspect of the influence of the industrial revolution. Political, ethical, religious, and social questions have all been involved in the general transformation of life and values. In many cases they are inseparably connected with economic problems. For instance, when the machine took over the work of the home, the latter became a new institution. One writer insists that the home, and woman as well, for all that, has not yet adapted herself to the new society. We all complain that the "machine process" has entered our colleges, and that college instruction is being "standardized" and college graduates "tagged." We all, at least occasionally, complain of the inability of law and religion alike to adjust themselves to modern industrialism. And our friends in ethics tell us that the newer industrial life is effecting startling changes in our standards of social and individual ethics.

And are we sure that we have reached the end of the "revolution"? Most likely we are in a second stage of the process, where problems are vastly different from those met in the first stage, which occupied the larger part of the nineteenth century. Perhaps there will be a third stage, unlike the second. Clearly the end of the new technology is not as yet. The technique first introduced has not as yet produced its full complement of social results. Quite as important, the new technique is being rapidly extended over a wider and wider area, constantly affecting the fortunes of people less and less adapted to it. Its extension preserves a frontier where machine culture is con-

stantly pushing back a civilization founded on a less complex technique. The reaction upon our system is fraught with grave consequences.¹⁴

16. **Laissez Faire.**—Both in England and in America we have passed through a cycle of politico-legal thought. In England, formerly, practically all combinations and almost all of the modern forms of commercial organization were unlawful; the business of the middleman was unlawful; the business of the modern wholesale grocer was unlawful. It was a criminal offense to buy food or victuals, which were on their way to the market, for the purpose of reselling them, or to buy, for purpose of resale, large quantities of food at any time. This, however, was before the days of the rise of capitalism. It was at a time when the laws of England were in the hands of the gentry, the land-holding or military classes. It was for the interest of these to oppose combination in every form. They were jealous of the growing power of the business man. It was for their interest to make, as they did make, both the trade combination and the labor combination or union criminal conspiracies. But at the beginning of the last century a change came. The war with France had been fought and won; the fleets of both the French and the Dutch had been practically swept from the seas; the foreign markets, which once belonged to the French or the Dutch, now belonged to England; the cotton gin had been invented; steam had been utilized; the mines had been uncovered; all that was necessary for England was to manufacture, and the markets of the world were open to her. At the same time the suffrage had been largely extended and the business man had come into political power, and, above all, capital had become diffused through the establishment of banks and the accumulated resources of the country made capable of utilization.

There was immediately a clamor on all sides for the overthrow of the restrictions of the past. In order to compete in the markets of the world, and to take advantage of the opportunities for wealth which the foreign trade afforded, ships had to be built and chartered, trading posts established, and factories built, and combinations of capital were found absolutely necessary. It was no longer for the interest of the employer that the rates of wages should be regulated by law, nor that the laborer be tied to the land. The manufacturer wanted the opportunity to offer extra wages, because at times he wished to work his factories night and day, so that he might get his goods rapidly upon the market. He did not want any restrictions on the hours of labor. In the past law and custom had so operated that no one could become a master mechanic or manufacturer who did not belong to one of the powerful trade guilds and who had not served an apprenticeship. In this new age of capitalism and of democracy—for it was

¹⁴ Reprinted by permission from Hamilton, *Current Economic Problems*, p. 36 et seq. (The University of Chicago Press, 1915.)

both a capitalistic and a democratic uprising—men wished to become employers, business men, and manufacturers on the strength of their brains and their capital alone. The consequence was that the restrictive laws of the past were repealed. The old hide-bound judicial decisions were reversed. The labor union and, to a large extent, the combination of capital were legitimized. "The lid was taken off." It was lawful to pursue to almost any length the war of competition. It was at this time that the industries in America began to really take their form; that our great commercial development began.

In America the *laissez faire* idea has been much more deeply rooted than in England, and it is natural that it should have been. The large amount of public land gave an opportunity to the wage-earner, which was not to be found in England or in France, and the era of the factory and of the large manufacturing centers was further in the distance. The agricultural population was much greater, and until recently almost anyone could be a landed proprietor. There was to be found, especially among the Puritans of New England a militant individualism; for it is to be noted that the teachings of Calvin were almost as much social and political as they were religious, and in them the right of self-government and the freedom of the church and of the locality from governmental interference was everywhere emphasized. The birth throes of the new country were a protest against navigation acts, searches and seizures, and governmental restraints of all kinds. So, too, class lines have never been so closely drawn here as in Europe, and the business classes have been constantly recruited from the laboring and the agricultural. Added to this was the individualism of the frontier, which everywhere chafes at control and at the restraints which collectivism thrusts upon it. Far away from central government and control they (the men of the frontier) established their own social customs, framed their own governments, provided for their own defense, and fought for the homes and the social institutions which they themselves had created. Just as to the old Anglo-Saxon chief the king was a mere war lord, raised to his position solely for military purposes, and with no conceded rights of social or political interference, so, too, by the average Western settler, central government was looked upon largely as a war device, or at best as a means to preserve the freedom of commerce, and not as something which should interfere with social and industrial customs or the freedom of industrial contracts. These earlier times, it is true, had in them none of the factory development of to-day; but even after that began, and great masses of people became crowded into the industrial centers, removed from the land, subject to the demands of their employers, and their labor the subject of barter and trade, and regulated by the law of supply and demand, the great majority of the voters still belonged to the farming classes, whose ownership of land and employment of labor cultivated in them, too, a deep-rooted, if not militant, individualism. But chief of all the causes of American individualism has been the fact that for

so many years opportunities for growth and advancement have everywhere been so plentiful that it has been hard for any of those who have themselves prospered to believe that governmental interference is necessary to protect any one, or that there is not in all matters a perfect equality of opportunity and of contractual ability.¹⁵

17. **Economic Freedom and Freedom of Thought.**—In the eighteenth century, the movements of the two previous centuries, toward freedom of thought and individualism in life, were carried to extremes, and a new movement begun, that may be called the movement toward economic freedom. It is par excellence the century of downbreaking in all the spheres of life and thought. Voltaire overthrew thrones with a jest, and made belief in revealed authority forever impossible. Rousseau discarded all conventionalities and external repressive institutions, called for a return to nature, and made subjective sentiment the rule of life—individualism with a vengeance! Hume, the friend of Rousseau, supplied a philosophy for all this, by reducing all thought to clusters of impressions and ideas, and defying these to get beyond themselves, either to a world of objects or to a subject. Kant, accepting this result, showed how the world we know, subjects and all, can be built up of these clusters, provided we bring out all that is implicit in them. Goethe, with Titanic nature, showed that man works out his own destiny by casting off his limitations and rising to spiritual freedom, among free men; that, as Tennyson puts it, “man is man and master of his fate.” Lastly, Adam Smith, devoting himself to a sphere of human action which thinking men had too long affected to despise, demanded freedom in the economic world, asserted that the shackles should be struck from the hands of labor, and that complete freedom of production and trade should be permitted—laissez faire, laissez passer—insisting, with perfect truth, that freedom of subsistence is the condition of all other freedom. Meanwhile individualism, the demand of the individual for recognition as an absolute end, found public utterance in the two great events of the century, the American and French Revolutions, in which men bodily declared that they were the lords, not the slaves or tools, of institutions, and that any institution or law which they could or would acknowledge, on pain of denying their manhood must be the expression of their own reason, a means toward the attainment of their own ends, as spiritual beings.¹⁶

¹⁵ Reprinted by permission from A. A. Bruce, “Laissez Faire and the Supreme Court.” (1908) Green Bag, p. 548 et seq., passim.

¹⁶ Reprinted by permission from Thomas Davidson, “The Task of the Twentieth Century.” XII (1901-02) International Journal of Ethics.

PART I

CONTRACTS NOT TO COMPETE

CHAPTER I

CONTRACTS IN EARLY ENGLISH TRADE

ANONYMOUS.

(1415. Year Book, 2 Hen. V, fol. 5, pl. 26.)

A writ of debt was brought on an obligation by one John Dyer wherein the defendant alleged, by Lod, that, according to a certain indenture which he put forth and on condition that the defendant should not use his art of a dyer's craft within the town where the plaintiff, etc., for a certain time, viz., for half a year, the obligation was to lose its force; and he said that he did not use his art of a dyer's craft within the time limited, which matter he offered to prove and demanded judgment whether the action, etc.

HULL. To my mind you might have demurred on him since the obligation is void because the condition is against the common law, and per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king.

Strange. We say that the defendant did use his art during the time, etc., to wit, for seven days within the time limited by the condition, ready, etc. Issue joined.

ANONYMOUS.

(Court of King's Bench, 1578. Moore 115.)

N. bound himself as an apprentice at Nottingham in the science of a mercer and at the time the master took an obligation from him that he would not employ his craft within four years at Nottingham; and notwithstanding this, he used his craft there and the master brought debt on the obligation; and it was held that the action was not maintainable. Vide 2 H. V, 6. (5?)

THE BLACKSMITH'S CASE.

(Court of Common Pleas, 1587. 2 Leo. 210, 3 Leo. 217.)

A blacksmith of South-Mims, in the county of Middlesex, took a bond of another blacksmith of the same town, that he should not exer-

cise his trade or art of a blacksmith within the same town, nor within a certain precinct of it; and upon that obligation, the obligee brought an action of debt in the Common Pleas, depending which, the obligor complained to the justices of peace of the said county upon the matter against the obligee, upon which the matter being found by examination, the justices committed the obligee to prison; and now, upon the whole matter, Puckering, Serjeant, prayed a habeas corpus for the said obligee to the Sheriff of Middlesex, and it was granted; and Fleetwood, Recorder of London, being at the Bar, the Court told him openly of this matter, that by the laws, justices of peace have not consueance of such offences, nor could meddle with them; for their power is limited by their commission and the statutes; and the recorder did much rely upon the opinion of Hull, 2 H. V, 5. But by the clear opinion of the whole Court, although this Court, being a high Court, might punish such offences appearing before them on record, yet it did not follow that the justices of the peace might do so: but as to the bond, the Court was of clear opinion, that it was void because it was against law.

COLGATE v. BACHELER.

(Court of King's Bench, 1596. Cro. Eliz. 872.)

Debt upon an obligation, conditioned, "That if R. Bacheler, son of the defendant, do at any time on this side or before the Feast of St. John Baptist which shall be in the year 1604,¹ either as apprentice or servant, or for himself as master, or otherwise, use the trade of an haberdasher within the county of Kent, the cities of Canturbury or Rochester; if then the within bounden R. Bacheler do upon request pay unto the plaintiff twenty pounds, that then the obligation shall be void."

The defendant, after oyer of the condition, pleads, that the obligation and condition were against the law.

Whereupon it was demurred in law; and, after argument, it was resolved by the Court, that this condition is against law, to prohibit or restrain any to use a lawful trade at any time, or at any place; for as well as he may restrain him for one time or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth; for being freemen, it is free for them to exercise their trade in any place. And although it were alledged, that here he is not prohibited or obliged absolutely that he shall not exercise the trade of an haberdasher, but that if he exercise it, he shall pay to the plaintiff £20, and so it differs from the case 2 H. V, pl. 5, b, yet the court said, it was all one; for he ought not to be abridged of his trade and living. Wherefore it was adjudged for the defendant.

¹ See Owen, 143, that the obligation was to run four years.

ROGERS v. PARREY.

(Court of King's Bench, 1613. 2 Bulst. 136.)

In an action upon the case grounded upon assumpsit, upon non assumpsit pleaded, a verdict was found for the plaintiff. It was moved in arrest of judgment, that the declaration was not good, wherein the case appeared to be this, the plaintiff shews in his declaration, that in consideration of so much, by him paid to the defendant, the defendant did assume and promise unto the plaintiff, that he would not exercise the trade of a joyner, in a shop, parcel of a house, to him demised in London, for 21 years, durante termino prædicto, and for breach shews, that he had demised this to a joyner who did there exercise the trade of a joyner, during the said term, and contrary to his promise, unde actio accrevit, exceptions taken to the declaration.²

CROKE, Justice. The doubt which at the first troubled me, was for the binding of one, that he should not use and exercise his trade, being his livelihood.

COKE, Chief Justice. This is not so, being but for a time certain, and in a place certain, but no general restraint there is here.

The Court agreed with CROKE, Justice, herein, that a man cannot bind one, that he shall not use his trade generally, this is not good; but COKE, Chief Justice, CROKE, Justice, and the whole Court, agreed all in this clearly, that as this case here is, for a time certain, and in a place certain, a man may be well bound, and restrained from using of his trade; and so by the whole Court, here is a good breach of promise assigned, which well entitles the plaintiff to his action, that the declaration is good; and so by the rule of the Court, judgment was given, and so entered for the plaintiff.

CASE OF THE TAILORS, ETC., OF IPSWICH.

(Court of King's Bench, 1614. 11 Coke, 53a.)

Magistri, Gardiani, et Communitas Scissorum et Operatorum Panorum villæ Gipwic' in com' Suff', brought an action of debt for £3. 13s. 4d. against William Sheninge; and declared, that whereas the King by his letters patent had incorporated the plaintiffs by the said name, and granted, that they should have plenam postestat' et auctoritat' facere et constituere rationabiles leges, ordinationes et constitutiones, in script' quæ eis viderentur bon', salubr' util', honest', et necessar' secundum eorum discretionem pro bono regimine et gubernatione, &c., societatis præd', &c., and to impose fines and amercements for breach of the said laws, &c., and recited the statute of 19 H. VII, 7, by which it is enacted, that no master, wardens, and Society of Crafts and

² A part of the case relating to a question of pleading is omitted.

Mysteries, take upon them to make any Acts or ordinances, nor to execute any Acts or ordinances, in exhæredationem seu diminutionem prærogativæ vel aliorum aliquorum, nec contra commune profic' populi, nisi iidem actus et ordinationes examinat' et approbat' forent per Cancellar', Thesaur' Angliæ, Capital' Justic' utriusque Banci, vel tres eorum vel aliter coram Justic' Assisæ in eorum itineribus, c., subpœna forisfact' £40. pro quolibet tempore quo ipsi in contr' facerent. And afterwards the said corporation in the same four years made divers constitutions, and (amongst others) that no person exercising any of the said trades within the town of Ipswich præd' should keep any shop or chamber, or exercise the said faculties, or any of them, or take an apprentice or journeyman, till he had presented himself to the master and wardens of the said society, for the time being, or some three of them, and should prove that he had served seven years at the least, as an apprentice, and before he should be admitted by them to be a sufficient workman; and if any should offend in any part thereof, that he should forfeit and pay to the said masters, wardens, and society aforesaid, for every such offense, five marks, and to levy it by way of distress, or by action of debt, &c. which (amongst others) was allowed by the Justices of Assise of the same county, according to the said Act of 19 H. VII. And that the said William Sheninge, tailor, using the trade of a tailor, after the said orders made and ratified as aforesaid, scil. 10 Octob. anno Regni Regis nunc 10, came to the said town of Ipswich, and there then used the trade of a tailor by the space of twenty days, before he had presented himself to the said master and wardens, or any three of them, or had made proof that he had served as an apprentice for seven years in the said trade, and before he was admitted by the said master and wardens, or three of them, to be a sufficient workman, per quod actio accrevit eisd' Magistr' Gardian' et Com' to have of the said H. the said £3. 13s. 4d. &c.

The defendant pleaded that he was an apprentice by the space of seven years, viz. 1 die Septemb' anno Reg. nunc 1 usque 2 diem Septemb' anno 8. to one H. Backet in the art of a tailor, &c. and that 9 Septemb' anno 10 Jac. Reg. Anthony Penny, Esq. inhabitant in Ipswich, retained him to be his domestic servant to serve him for a year, and that he within the same time, by the command of the said A. made divers clothes and garments for him, his wife and children, as he well might, which is the same use and exercise of the trade of a tailor, whereof the plaintiffs have declared: upon which the plaintiffs demurred in law. And in this case, upon argument at the Bar and Bench, divers points were resolved.

1. That at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, otium omnium vitorum mater, and especially in young men, who ought in their youth (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in

age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade; and that appears in 2 H. V, 5 b, a dyer was bound that he should not use the dyer's craft for two years, and there Hull held, that the bond was against the common law, and by G——d if the plaintiff was here, he should go to prison till he paid a fine to the King; so, and for the same reason, if an husbandman is bound that he shall not sow his land, the bond is against the common law. And vide 7 Ed. III, 65 b.; and if he who takes upon him to work is unskillful, his ignorance is a sufficient punishment to him; for *imperitia est maxima mechanicorum poena*, et *quilibet quærit in qualibet arte peritos*: and if any one takes upon him to work, and spoils it, an action on the case lies against him. And the statute of 5 Eliz. IV, which prohibits every person from using or exercising any craft, mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skillful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades; and thereby it appears, that without an Act of Parliament, none can be in any manner restrained from working in any lawful trade. Also the common law does not prohibit any person from using several arts or mysteries at his pleasure, *nemo prohibetur plures negotiationes sive artes exercere*, until it was prohibited by Act of Parliament of 37 Ed. III, cap. 6. scil. That the artificers and people of mystery hold themselves every one to one mystery, and that none use other mystery than that which he has chosen: but this restraint of trade and traffic was immediately found prejudicial to the commonwealth, and therefore at the next Parliament it was enacted, that all people should be as free as they were at any time before the said ordinance.

2. That the said restraint of the defendant, for more than the said Act of 5 Eliz. has made, was against law; and therefore forasmuch as the statute has not restrained him who has served as an apprentice for seven years from exercising the trade of a tailor, the said ordinance cannot prohibit him from exercising his trade, till he has presented himself before them, or till they allow him to be a workman; for these are against the liberty and freedom of the subject, and are a means of extortion in drawing money from them, either by delay, or some other subtle device, or of oppression of young tradesmen, by the old and rich of the same trade, not permitting them to work in their trade freely; and all this is against the common law, and the commonwealth: but ordinances for the good order and government of men of trade and mysteries are good, but not to restrain anyone in his lawful mystery.

3. It was resolved that the said branch of the Act of 5 Eliz. is intended of a public use and exercise of a trade to all who will come, and not of him who is a private cook, tailor, brewer, baker, &c. in the house of any for the use of a family; and therefore if the said ordinance had been good and consonant to law, such a private exercise

and use had not been within it, for every one may work in such a private manner, although he has never been an apprentice in the trade.

4. It was resolved, that the statute of 19 H. VII, 7, doth not corroborate any of the ordinances made by any corporation, which are so allowed and approved as the statute speaks, but leaves them to be affirmed as good, or disaffirmed as unlawful by the law. The sole benefit which the incorporation obtains by such allowance is, that they shall not incur the penalty of £40. mentioned in the act, if they put in use any ordinances which are against the King's prerogative, or the common profit of the people, &c.; and judgment was given, *quod querentes nihil ceperent per billam.*

BROAD v. JOLLYFE.

(Court of King's Bench, 1620. Cro. Jac. 596.)

Assumpsit. Whereas the defendant was a mercer, and kept a shop at Newport in the Isle of Wight, and had his shop furnished with divers old and sullied wares, and the plaintiff had a shop there furnished with new and fresh wares; in consideration the plaintiff should buy of him all his said wares in the said shop, and would pay for them such prices as he paid when he first bought them, that he assumed that he would not longer keep a mercer's shop in Newport: and alleges in fact, that he bought of him all of his said wares, and paid him three hundred pounds for them, being the price which he had paid for the said wares when he bought them, whereas in truth they were not then worth one hundred pounds; and that the defendant contrary to his promise kept his said shop, and furnished it with new and fresh wares, &c. to the plaintiff's damage five hundred pounds. After non assumpsit pleaded, and verdict for the plaintiff to his damage of forty pounds.

It was moved in arrest of judgment, that this assumpsit is against law, to restrain any to use their lawful trade; and for that purpose cited 2 Hen. V, pl. 5. where an obligation that one should not use the trade of a dyer was held to be void.

HOUGHTON, Justice, was of that opinion, for the reason above-mentioned; but all the other justices held, that it was a good assumpsit, for it is voluntary; and upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers; and it is usual here in London for one to let his shop and wares to his servant when he is out of his apprenticeship; as also to covenant that he shall not use that trade in such a shop, or in such a street: so for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for *volenti non fit injuria*. And it is not like to the case in 2 Hen. V, before cited; for there it is al-

leged, that he was compelled to enter into such a bond, it being an offense for which Hull swore he would have committed him had he been there; yet there the issue is taken, that he did not use the trade of a dyer in the said vill; which proves, that the defendant durst not demur thereupon; but the bond was allowed good. But here it is upon a good consideration, viz. that he should pay three hundred pounds for wares which were not worth one hundred and fifty pounds, for which he made the said promise, and is strong enough against himself.

MONTAGUE, Chief Justice, cited the case in 13 Hen. VII. If a feoffment be made upon a condition that he shall not alien, it is a void condition, for it is against law; yet a covenant that he shall not alien, is good; wherefore it was adjudged for the plaintiff.

And in Michaelmas term, 19 Jac. I, this judgment was affirmed in a writ of error before all the justices and Barons of the Exchequer; for they held, that one may voluntarily give over his trade, and is not compellable to use it, especially in one certain place; and therefore he may, upon good consideration, agree that he will not use it within such a vill; and upon the matter, it is but the selling of his custom, and leaving another to gain it. And it was said, that a prescription to restrain one from using a trade in such a place is good. Easter term, 18 Jac. I, Bragg v. Tanner, assumpsit for ten shillings he promised to pay an hundred pounds, if he thenceforward kept any draper's shop in Newgate-market: judged good, and the plaintiff recovered.

PRUGNELL v. GOSSE.

(Court of King's Bench, 1648. Aleyn, 67.)

In a writ of error upon a judgment in the C. B. in an action upon the case, for that the defendant in consideration of a marriage to be had between the plaintiff and her daughter, promised to give 100 li. to the plaintiff, and 10 li. for apparel for her daughter. And whereas the defendant had a shop in Basingstooke, with divers wares in it, she promised to assign over the shop to the plaintiff, et transferre negotiationem suam Angl, her trade, to the plaintiff, and that she would not use her trade any longer in Basingstooke; and breach assigned in not paying the money nor assigning the shop, and for that she used the trade there still, &c. And upon non assumpsit, a verdict for the plaintiff and entire damages given. And Twisden moved for error, that the promise not to use her trade was against law, and void, and cited More's Reports, Pasc. 20 El. p. 182. A bond that one should not use the trade of a mercer in Nottingham, is void; vide simile Mor'. Mich. 29 El. p. 284, et Hil. 44 Eliz. C. B. que est enter Mich. 42 et 43 El. Rot. 2217. entr' Geggot et Batchelor. A bond with condition that one should not use the trade of a haberdasher in Kent for four years,

was holden void; et lib. 11, 53, h. et 2 H. V, 6 (5?). And this was agreed by Roll for law, who took these differences, that where a bond or promise restrains the exercise of a trade, although it be as to a particular place only, yet if it be upon no consideration, the bond &c. is void: but if there were consideration for the restraint, as if A. assign a shop, or sell braided ware to B. there in respect of the apparent prejudice which may accrue to B. if A. should continue the trade, such a bond or promise is good; and so was it adjudged in Froward's case upon a writ of error out of Bridgenorth: but although there be such a consideration, yet if the restraint be general throughout England, it is void. Another exception was, that the words *transfere negotiationem suam*, were of an incertain signification, but not allowed; and so the judgment was affirmed.

CLERK v. GOVERNOR AND COMPANY OF TAYLORS OF
EXETER.

(Court of Exchequer Chamber, 1685. 3 Lev. 241.)

Error of a judgment in B. R. in debt upon an obligation conditioned, that the defendant should not use the trade of a taylor in Exeter. Whereto the defendant pleads there, that he was an expert taylor, and skillful in the art thereof; and the defendants (in error) pretending that none who was not a member of their corporation ought to use that trade there, did many ways vex and trouble him; and he, to prevent such vexation, gave to them the said obligation, which is contrary to law, and void. The plaintiffs there replied, that the defendant sealed and delivered the said obligation as his deed; and it was adjudged in B. R. that the obligation not restraining the trade generally, but only in a particular place, viz. Exeter, was not void. Whereupon the defendant there brought a writ of error in the Exchequer Chamber, and the error assigned was only in point of law, viz., whether the said obligation was void? And after divers arguments in Trinity term and this term, and also in the following Hilary term, it was held by all the Judges, that the judgment in B. R. was erroneous, and the obligation void, for which they in Hilary term following reversed the judgment; and the principal reason was, that it being a penal obligation for restraining the exercise of a trade, though it was in a particular place, it is void; otherwise if it had been on an *assumpsit* for a good consideration not to use a trade in a particular place, because in such cases all being to be recovered in damages, it is in the power of the jury to assess the damages, on weighing the consideration of the promise and the mischief to the party promising; but in this case the whole penalty is to be forfeited, let the consideration be what it will, and let the offense be never so small; as in the case of an infant, a

bond or bill for necessities is void, but an assumpsit is good; and some Judges held, that a covenant or promise to pay a certain sum if he use his trade is ill, because that is a debt for which an action of debt will lie; but a promise upon a good consideration, as for transferring his trade or shop, that he shall not use the trade in the town where he ought to use it, they allowed to be good, because all is uncertain, and is to be ascertained by the jury which tries the cause, viz. of what value the consideration is, and what damage the use of the trade is to the party to whom the promise is made: and for authorities were cited 2 H. V, 5 b, the opinion of Hull, which they said is good law, and was never denied in case of an obligation to restrain a trade in any particular place, or for a particular time, as there for six months: but promises in such cases have been divers times allowed to be good, as All. 67, the case of Pragnell and Glass, Mar. 77, 193, an assumpsit held good but an obligation void in such cases, and Mo. pl. 255. Obligation not to use a trade in Nottingham, void; and Id. pl. 377. Obligation not to use a trade in Monm. void. Ow. 143. Obligation conditioned not to use a trade in Kent, void: 2 Leon. 210, the like obligation held void, but 596, an assumpsit upon a good consideration held good, and Noy. 98, the same case; so 2 Roll. Rep. 20, and Sty. 111, Pragnell against Goffe, it was the consideration which made the promise good, All. 67, accords, and 2 Keb. 377, Tresby vers. Arrowsmith, the roll whereof was brought into Court, and is entered Pasch. 20 Car. II, B. R. Rot. 66, an obligation that he should not use a trade in Chichester adjudged void; and in Hilary term following the judgment of B. R. in this case was reversed by the unanimous consent of all the Judges.

MITCHEL v. REYNOLDS.

(Court of King's Bench, 1711. 1 P. Wms. 181.)

Debt upon a bond. The defendant prayed Oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's Holborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. Quibus lectis et auditis, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, PARKER, C. J., delivered the resolution of the court.³

³ The opinion in this case has been considerably abridged.

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions; in order whereunto, I shall proceed in the following method: First. Give a general view of the cases relating to the restraint of trade. Secondly. Make some observations from them. Thirdly. Shew the reasons of the differences which are to be found in these cases; and—Fourthly. Apply the whole to the case at bar.

As to the cases, they are either, first, of involuntary contracts, against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties. * * *

Voluntary restraints by agreement of the parties, are either first, general; or secondly, particular, as to places or persons.

General restraints are all void, whether by bond, covenant, or promise, etc., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596; 2 Bulst. 136; Aley, 67.

Particular restraints are either, first, without consideration, all which are void by what sort of contract soever created. 2 H. V, 5; Moore, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 156. Or, secondly particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136, *Rogers v. Parry*. Though that case is wrong reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. I; Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98; W. Jones, 13; Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, and with or without consideration, which stands upon very good foundation: Volenti non fit

injuria; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 172, *Bragg v. Stanner*. The entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Aleyn's, 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly. I come now to make some observations that may be useful in the understanding of these cases. And they are—First. That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law. Secondly. That when restrained to particular places or persons (if lawfully and fairly obtained), the same is not a monopoly. Thirdly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful. Fourthly. That it is lawful upon good consideration, for a man to part with his trade. Fifthly. That since actions upon the case are actions injuriarum, it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously. Sixthly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty. Seventhly. That no man can contract not to use his trade at all. Eighthly. That a particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do. * * *

Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, first, to the party, by the loss of his livelihood, and the subsistence of his family; secondly, to the publick, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

Thirdly. Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action. See Puff. lib. 5, c. 2, sect. 3; 21 H. VII, 20.

Fourthly. The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

Fifthly. The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. *Barrow v. Wood*, March, Rep. 77; Mich. 7 Ed. III, 65; *Aleyn*, 67; 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shewn by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that wherever such contract stat in-different, and for ought appears, may be either good or bad, the law presumes it prima facie to be bad, and that for these reasons:

First. In favour of trade and honest industry.

Secondly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

Thirdly. For that mischief (as I have shewn before) is not only private, but public.

Fourthly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the publick, every body is affected thereby; for it is to be observed, that tho' it be not shewn to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds on that reason, (viz.) as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As first, that all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shewn can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will inforce these latter contracts, but not the former.

Secondly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a nudum pactum, but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in bonds and

covenants; but these latter, tho' they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seized, which is void without a consideration, tho' it be a compleat and perfect deed.

Thirdly. It shews why a contract not to trade in any part of England, tho' with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, tho' it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.

Fourthly. This shews why promises in restraint of trade have been held good; for in those contracts, it is always necessary to shew the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shewn. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hull in 2 H. V, fol. quinto; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, tho' not his manner of expressing it. Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice. * * *

The application of this to the case at bar is very plain: Here the particular circumstances and consideration are set forth, upon which the Court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade of this neighbourhood; the concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, viz. the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of the opinion, that the plaintiff ought to have judgment.

CHAPTER II

CONTRACTS CONCERNING THE USE OF SKILL OR ENTERPRISE

SECTION 1.—AFTER A TERM OF EMPLOYMENT

HORNER v. GRAVES.

(Court of Common Pleas, 1831. 7 Bing. 735.)

TINDAL, C. J.¹ Two questions arise upon the deed on which this action is brought, and which is set forth upon the face of the declaration: the first, whether the deed is void, as being in restraint of trade; the second, supposing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant, is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the plaintiff.

The deed purports to be an agreement under seal between the plaintiff and the defendant, whereby the defendant covenants with the plaintiff that he, the defendant, would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon dentist for five years. And the said plaintiff, in consideration of such service, and of the covenants of the defendant, did covenant with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon dentist; and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention, "and that the said defendant should not nor would, at the expiration or other sooner determination of the said term (provided the said plaintiff were then living, and practicing in the said business or profession, etc.), exercise or practice the said business or profession at or within the distance of 100 miles of the city of York, without the previous consent in writing of the said plaintiff, under the penalty of £1,000. to be forfeited and paid by defendant, his executors and administrators, and to be recovered in any of His Majesty's courts of record at Westminster as and for liquidated damages." The deed then contained a clause by which the plaintiff might determine the service by giving three months' notice in writing.

The first question is, whether this agreement is void in law.

The law upon this subject has been laid down with so much authority and precision by Parker, C. J., in giving the judgment of the Court

¹ The statement of facts is omitted.

of B. R. in the case of *Mitchel v. Reynolds* (1 P. Wms. 181), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now the rule laid down by the court in that case is, "That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, and whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract," that is, so as it is a reasonable restraint only, "are good."

The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the defendant from carrying on his trade or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the defendant's carrying on that trade in which the plaintiff had agreed to receive the defendant as his assistant.

Now, as to the consideration, it must be confessed it is very small, compared with the restraint under which the defendant consents to place himself. The plaintiff takes the defendant as his assistant for five years, at a salary of £120. for the first year, to be afterwards increased, with a power to dismiss him at any time by a three months' notice. The defendant covenants not to exercise or practise the profession within 100 miles of the city of York, if the plaintiff continues to carry on his business of a surgeon dentist, under the penalty of £1,000. The defendant, in order to be capable of being employed by the plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person of some skill and experience, which he had before acquired. At the time of entering into this contract, he was at liberty to set up his trade, and endeavour to gain a livelihood, within the city of York. But under the present contract, after being employed by the plaintiff for three months only, and receiving in consequence no more than the sum of £30., he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of 100 miles from the city of York. Surely this appears a very slender and inadequate consideration for such a sacrifice.

But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than

necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.

In the case above referred to, Lord Chief Justice Parker says, "A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;" which are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term: and then restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade.

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which, excessive. In *Davis v. Mason*, 5 T. R. 118, where a surgeon had restrained himself not to practice within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, but in the eye of the law; and upon the bare inspection of this deed it must strike the eye of every man that a circle round York, traced with the distance of 100 miles, encloses a much larger space than can be necessary for the plaintiff's protection.

The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground, as it is to hold good during the whole time the plaintiff continues to carry on his business, wherever he may be; so that if the plaintiff removed from York, to places where the practise at York by the defendant could not injure him, still the restriction continues.

We therefore think the contract is one which contains a restraint of the defendant to carry on his trade, for larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such a restraint cannot form the subject of an action.

The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection. Indeed, that objection would only go to an assessment of damages by a suggestion of breaches on the present record.

Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.

HITCHCOCK v. COKER.

(Exchequer Chamber, 1837. 6 Adol. & E. 438.)

TINDAL, C. J.² The ground upon which the Court of King's Bench held, after a verdict obtained by the plaintiff in this case, that the judgment of that court ought to be arrested, was, that the agreement set out upon the record, and upon which the action was brought, was void at law, being an agreement in unreasonable restraint of trade. For, although the inadequacy of the consideration, upon which the agreement was entered into, was urged in argument as one reason for holding the agreement to be void,—and, in the delivering the opinion of the court, some reference was made to that objection,—yet it is manifest that it formed no part of the ground upon which the court refused to give their judgment in favour of the plaintiff.

The consideration for the agreement in question appears to have been, the receiving of the defendant into the service of the plaintiff as an assistant in his trade or business of a chemist and druggist, at a certain annual salary. And the agreement, on the part of the defendant, founded upon such consideration, is that, if he should at any time thereafter, directly or indirectly, in his own name or that of any other person, exercise the trade or business of a chemist and druggist within the town of Taunton, in the county of Somerset, or within three miles thereof, then that the defendant should, on demand, pay to the plaintiff, his executors, administrators or assigns, the full sum of £500. as and for liquidated damages.

The ground upon which the court below has held this restraint of the defendant to be unreasonable is that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the court, that, where the restraint of a party from carrying on a trade is larger and

² The statement of facts is omitted.

wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighborhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But with respect to the duration of the restriction the case is different. The good will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering the same trade in the same town in which his master lives; so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to be unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit coextensive with the servant's life.

And, accordingly, in many of the cases which have been cited, the restriction has been held good, although it continued for the life of the party restrained. And, on the other hand, no case has been referred to, where the contrary doctrine has been laid down. In *Bunn v. Guy*, 4 East, 190, a covenant by an attorney, who had sold his business to two others, that he would not, after a certain day, practice within certain limits, as an attorney, was held good in law, though the restriction was indefinite as to time. In *Chesman v. Nainby* (in error) the condition of the bond was that Elizabeth Vickers should not, after she left the service of the obligee, set up business in any shop within half a mile of the dwelling house of the obligee, or of any other house that she, her executors or administrators, should think proper to remove to, in order to carry on the trade; and in that case the con-

tract was held to be valid, though the restriction was obviously indefinite in point of time, and although one of the grounds on which the validity of the contract was sought to be impeached was, that the restriction for was the life of the obligor. Again, in *Wickens v. Evans*, 3 Y. & J. 318, the agreement in restraint of trade was made to continue during the lives of the contracting parties; and no objection was taken on that ground.

We cannot, therefore, hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

But it was urged, in the course of the argument, that there is an inadequacy of consideration, in this case, with respect to the defendant, and that, upon that ground, the judgment must be arrested. Undoubtedly in most, if not all, the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended, only, that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a nudum pactum, and therefore void. But, if by adequacy of consideration more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shewn upon the record a legal ground of action; and, having obtained a verdict in his favour, that he is entitled to judgment.

Judgment for the plaintiff.

ROUSILLON v. ROUSILLON.

(Chancery Division, 1880. 14 Ch. Div. 351.)

This action was brought to restrain the defendant from violating an agreement in restraint of trade, and to enforce a judgment which the plaintiffs had obtained in France on the agreement.

The plaintiffs, Jean Rousillon and Gustave Rousillon, carried on business in partnership as champagne merchants, at Epernay in France. They had also an office in London. They were not the proprietors of any vineyard, but they were in the habit of either buying grapes from the owners of vineyards in Champagne and then manufacturing and bottling the wine, or buying the wine from the owners of the vineyards and then bottling it. They exported the wine to England and other countries.

The defendant, Auguste Rousillon, was a nephew of the plaintiff Jean Rousillon. He was a native of Switzerland. In 1866 the plaintiffs took him into their employment as a clerk, with a view to his learning their business, and they afterwards sent him to England at their expense that he might learn English.

In November, 1867, he commenced travelling for the plaintiffs in England and Scotland, and was occasionally also sent by them to Holland. He continued in this employment until October, 1869. On the 9th of October, 1869, the defendant was at Epernay on a short visit on his way back to England, after spending his holiday with his friends in Switzerland. On the 9th day of October, 1869, the defendant wrote a letter in the French language, addressed to the plaintiff Jean Rousillon, of which the following is a translation:

"As a return for the kindness and care of which I have been the object, and the trouble you have taken in my commercial education, I address this letter to you, as a proof that I undertake not to represent any other champagne house for two years after having left you, if at any time I leave your house for any reason whatever, whether it be on your part or on my own. I also undertake not to establish myself, nor to associate myself with other persons or houses, in the champagne trade (*dans le commerce des champagnes*) for ten years, in case I should leave you as already mentioned above.

"I enter into these engagements, trusting to your assurance that I may rest in the idea that my position is assured in your house, except in the event of unforeseen events or of negligence on my part in your affairs, which are or shall be entrusted to me, and I promise to do all in my power to maintain and increase the good reputation of your house in the countries I am connected with."

At the time when this letter was written the defendant was domiciled in Switzerland, but his place of residence was in England. Soon after the letter was written the defendant returned to England, and resumed his employment for the plaintiffs; and he continued in their

employment as a traveller in England and Scotland until the 1st of March, 1877, when they gave up their retail trade, and no longer required his services.

In May, 1878, the defendant started in business as a retail wine merchant in London, selling champagne and other wines. In his advertisements and circulars he described himself as of "Ay, Champagne," and he placed a similar brand on the corks of the bottles of champagne wine which he sold. He had in fact no establishment at Ay, or elsewhere in Champagne, but he imported the champagne wine which he sold from growers in Champagne. The plaintiffs alleged that the defendant was in this way violating the engagement which he had entered into by the letter of the 9th of October, 1869, and in September, 1878, they instituted an action against him in the Tribunal of Commerce at Epernay. On the 6th of November, 1878, they obtained a judgment against him, which (*inter alia*) condemned him to pay 15,000 francs in compensation for the damage done to that day to the plaintiffs, and also to pay costs.³

FRY, J. * * *. In the next place, it is said that the contract is not reasonable, and it is unquestionably the law of this country that contracts of this description, being in restraint of the freedom of trade, must be reasonable.

Now, what is the criterion by which the reasonableness of the contract is to be judged? I will take the law on that point from the language of Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in *Hitchcock v. Coker*, 6 A. & E. 438. He said: "We agree in the general principle adopted by the court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." That passage was adopted by Lord Wensleydale, when a Baron of the Court of Exchequer, in delivering judgment in *Ward v. Byrne*, 5 M. & W. 548, and therefore the rule so expressed has the authority of the Courts of Queen's Bench, Exchequer, and Exchequer Chamber. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable.

Another case which in my view throws great light upon this question is *Tallis v. Tallis*, 1 E. & B. 391. There the plaintiff and the defendant had been partners as publishers of books. Part of their trade, called the canvassing trade, consisted in publishing books in numbers, and employing travellers to sell such books by canvassing for purchasers. The partnership was dissolved, the plaintiff being the continuing partner. The defendant agreed amongst other things, not directly or in-

³ The remainder of the statement of facts and a part of the opinion are omitted.

directly to be concerned in the canvassing trade in London or within 150 miles of the general post office, nor in Dublin or Edinburgh, or within fifty miles of either, nor in any town in Great Britain or Ireland in which the plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. The action was for a breach of the covenant. It was pleaded, amongst other things, that there were numerous works which the plaintiff did not publish, and had no intention of publishing, and that many of such works might be published by the defendant with advantage to the public and without injury to the plaintiff; that the canvassing trade applied to all such books; and that the restraint, as to the canvassing trade as applicable to such books, was unreasonable. The court, upon those pleadings, and upon a demurrer, held that the declaration was good, it not appearing that the restraint was unreasonable. And in giving judgment they considered a dictum in *Mitchel v. Reynolds*, 1 P. Wms. 181, 191, to the effect "that wherever such contract stat indifferenter, and for ought appears may be either good or bad, the law presumes it *prima facie* to be bad." But, instead of adopting that view, they called attention to what was said by the Court of Exchequer in *Mallin v. May*, 11 M. & W. 653, "that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid." And further on in their judgment they said this: "Even if the facts therein" (in the pleas) "stated are taken to be admitted by the demurrer, and that the reasonableness of the restriction in question is to be considered with reference to those facts together with the facts alleged in the declaration, still we think the pleas bad." For, although the books capable of republication may be almost infinite, still the number of subscribers to such republications coming out in numbers is limited; and although, if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we cannot ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to we ought not to hold the contract void." In other words, the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of shewing that it was plainly and obviously clear that the protection extended, by the proposed exclusion of the defendant's publications, beyond what the plaintiff's interests required. And such, in my opinion, ought to be the rule of law upon this point, because the defendant is seeking to put a restraint upon the

freedom of contract, and he who does that must, I think, shew that it is plainly necessary for the purposes of freedom of trade. I adopt the views expressed by the Master of the Rolls in *Printing and Numerical, etc., Company v. Sampson*, L. R. 19 Eq. 462, as to the necessity of courts being careful how they invade the freedom of contract.

The question then arises, does the defendant in the present case discharge the burthen so cast upon him? In answering that I must consider the facts of the case. It appears that at the time this contract was entered into the defendant had for some two years been acting as the representative of the plaintiffs in England. His custom appears to have been under their directions to travel over all parts of England and over Scotland, and at a subsequent date he visited Holland for the purposes of their trade. He had by a residence of some four months in Epernay at the house of the principal plaintiff acquired a knowledge of the plaintiffs' trade as carried on in France. He was therefore acquainted with the trade at both its ends. He was a relative of the plaintiffs, and bore their name. Looking, therefore, at the extent of the trade carried on by the plaintiffs, and its diffusion over the whole of England; looking at the facilities which exist for carrying on trade in various places by means of the freedom of communication which exists between them, I cannot say that it has been made plain and obvious to me that this contract exceeds in its extent that to which the plaintiffs were entitled for the protection of their trade. No doubt criticisms may be made on the contract, and it may be said that you can conceive cases to which the restraint would apply in which no injury would be done to the plaintiffs. But that observation would have applied to *Tallis v. Tallis*, 1 E. & B. 391, and when I bear in mind the devious channels through which trade is influenced, and the great difficulty of providing for every possible case in which injury might arise, without including possible cases in which injury might not arise, I have come to the conclusion that it has not been shewn that this contract is larger than is necessary for the reasonable protection of the plaintiffs, and I hold, therefore, that this objection fails.

But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void.

Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed

would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority.

In the next place, the rule is pressed upon me as an artificial rule, an absolute rule, or, as it was called by the late Vice Chancellor Wickens, a hard and fast rule. Such a rule might always be evaded by a single exception. No exception can be said to be colourable to a rule of this description, because you can only judge whether an exception be colourable or not by the principle of the rule, and if the rule be really an artificial one without principle, there is no criterion for saying whether the evasion is colourable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established.

How, then, stand the authorities on the point? There are undoubtedly cases in which it has been said that the restraint must not be universal. Such are *Ward v. Byrne*, 5 M. & W. 548, and *Hinde v. Gray*, 1 Man. & G. 195; but looking to the judgments in those cases, and reading them with a view to the subject-matter, they appear to me to relate only to cases in which the universality is unreasonable, and more than once in *Ward v. Byrne* the rule is so explained, although I candidly admit that you may select other passages in which the court seems to say that the universality is of itself an objection to the contract. Undoubtedly, Vice Chancellor Wickens, of whose judgments I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and he so expressed himself in *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59. He said that "there has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases, that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward v. Byrne*, and in *Hinde v. Grey*, and in other cases; and the rule, if not obviously just, is, at any rate, simple and very convenient. No doubt in the case of *Leather Cloth Company v. Lorstont*, L. R. 9 Eq. 345, Lord Justice (then Vice Chancellor) James threw some doubt on the existence of a hard and fast rule, which makes a covenant in restraint of trade invalid, if unlimited in area." There are earlier cases than the one before the Vice Chancellor James which seems to me to be inconsistent with the existence of the supposed hard and fast rule. In *Whittaker v. Howe*, 3 Beav. 383, a case relating to an attorney's busi-

ness, it was stipulated that the business should not be carried on in any part of Great Britain for twenty years; again, in *Jones v. Lees*, 1 H. & N. 189, the covenant was against selling a particular article anywhere in England without the invention of the plaintiff applied to it, and the objection that the covenant was unlimited as to space was taken. "It is objected," said Mr. Baron Bramwell, "that the restraint extends to all England; but so does the privilege. The cases with respect to the sale of a good will do not apply, because the trade, which is the subject-matter of the sale, is local, and therefore a prohibition against carrying it on beyond that locality would be useless." In other words, the learned judge explains the inclination of the courts against the universality of a prohibition as applying only to cases where the subject-matter of the sale was itself local. That is just the view I take of the earlier cases. Still more important are the observations of Lord Justice James in *Leather Cloth Company v. Lorrison*, where he undoubtedly came to the conclusion that no such rule had been laid down as has been insisted on before me. Having referred to the cases, he says: "I do not read the cases as having laid down that irrebuttable presumption which was insisted on with so much power by Mr. Cohen. All the cases, when they came to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract." I have, therefore, upon the authorities, to choose between two sets of cases, those which recognise, and those which refuse to recognise this supposed rule, and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable. It follows, therefore, that, in my judgment, the plaintiffs have established their right upon the contract to an injunction.

DOWDEN & POOK, Limited, v. POOK.

(Court of Appeals. [1904] 1 K. B. Div. 45.)

Application for judgment or a new trial in an action tried before Grantham, J., with a jury.

The action was for damages for breach of covenant, and for an injunction to restrain the defendant from further breaches of the covenant.

The plaintiffs carried on the businesses of cider merchants and cordial manufacturers. By an agreement under seal dated June 14, 1901, and made between the plaintiffs and the defendant, the plaintiffs appointed the defendant to be the manager of the Newton Abbot

department of their business upon certain terms, and the defendant covenanted with them that he would not, "either solely, or jointly with, or as manager or agent for, any other person or persons or company, directly or indirectly, carry on, or be engaged or concerned or interested in the business of a cider merchant, manufacturing chemist, or cordial compounder, nor permit or suffer his name to be used or employed in carrying on, or in connection with, the said business, for the term of five years after leaving the service of the company."

The defendant was afterwards dismissed from the employment of the company, and had, subsequently to his dismissal, committed breaches of the above-mentioned covenant by being engaged in carrying on the business of a cider merchant.

The defense was set up that the covenant was void as being in restraint of trade. Evidence was given at the trial with regard to the nature and extent of the plaintiffs' business, which, as will be seen from the judgments, showed, in the opinion of the Court of Appeal, that the plaintiffs' business was not of such a character as to render so wide a restriction as that imposed by the covenant reasonably necessary for the protection of the plaintiffs. The learned judge at the trial left to the jury the question whether the covenant was wider than was necessary for the protection of the plaintiffs' business. The jury answered that question in the affirmative. The judge, however, on further consideration, was of opinion that the question whether the covenant was reasonable having regard to the circumstances, was for him and not for the jury; and held that the covenant was reasonable, and therefore not void as being in restraint of trade. He therefore gave judgment for the plaintiffs, and granted an injunction as claimed.⁴

COZENS-HARDY, L. J. I am of the same opinion. Questions relating to restraint of trade appear in recent times to have been generally dealt with in the Court of Chancery, or the Chancery Division, where there is no separation between the functions of judge and jury; so that it is necessary to go back a good while in order to find any authority on the question whether it is for the judge or the jury to decide as to the reasonableness of the restriction imposed by a covenant such as that here in question. It appears to me that the authorities referred to by the Master of the Rolls⁵ are clear on the point and I will only refer to one passage from the judgment of the court in the case of *Mallan v. May*, 11 M. & W. 653, 63 R. R. 708, which was delivered by Parke, B. He said: "We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz., the reasonableness or unreasonableness of the

⁴ The opinions of Collins, M. R., and of Mathew, L. J., are omitted.

⁵ *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711); *Mallan v. May*, 11 M. & W. 653 (1843); *Tallis v. Tallis*, 1 E. & B. 391 (1853).

contract, to the jury. This is clearly a question of law, and was decided as such in *Davis v. Mason*, 5 T. R. 118, 2 R. R. 562, *Horner v. Graves* (1831) 7 Bing. 735, 33 R. R. 635, *Proctor v. Sargent* (1840) 2 M. & G. 20, 58 R. R. 342, and *Chesman v. Nainby* (1726) 2 Str. 739, 2 Ld. Raym. 1456." The latter case appears to have gone to the House of Lords, and been decided by them in 1727. So the law on this subject seems to have been established so long as nearly two centuries ago. The question is really one of public policy, which is not a question of fact for a jury, but of law for the judge. No doubt the judge who has to decide the question has to consider the particular circumstances of the case. In most cases these probably either would be formally admitted, or would not substantially be in dispute; but of course cases might be imagined, in which it might be necessary, in order to enable the court, as a matter of law, to say whether the covenant was reasonable, that evidence should be given as to such matters as the nature and extent of the business to be protected; and, if such evidence were so far conflicting that a serious issue of fact were raised, it might be proper for the judge to leave that issue to the jury, if the case were tried with a jury. In the present case there does not appear to me to be any such issue, and I think the Court has before it all the materials necessary to enable it to decide, without the intervention of a jury, the question whether the covenant sued upon is reasonable or not.

In dealing with that question it is first of all necessary to decide what is the true construction of the covenant. On the construction of the covenant in this case I cannot doubt that it imposes a world-wide restraint. I can see no ground for limiting its operation to the United Kingdom. I think it must stand or fall as being a covenant prohibiting the defendant from carrying on the businesses in question in any part of the world. The question whether such a covenant is valid depends upon the question whether it could really be necessary for the protection of the particular business carried on by the plaintiffs. There may be some businesses of such a character that a covenant of this kind might not be unreasonable with regard to them; but the question is whether it can be said to be reasonable with regard to the plaintiffs' business. Now what was the nature and extent of that business? The critical period, at which to look, is the time when the covenant was entered into. The share capital of the company appears to have been somewhere about £5,000., but I gather that a large part of the shares were taken to be fully paid up. It was stated that about £4,000. had been raised on debentures. Taking the most favourable view, the capital does not appear to have been more than about £9,000., and it probably was really less. The number of the company's customers was not great, being somewhere about 1,200, mostly local. In substance, it may be described as a not very large cider business in the west of England. It appears to me to be impossible to say that, for the protection of a business of this kind, and limited as this

business was, it was reasonably necessary that the defendant should be restrained from carrying on business as a cider merchant in any part of the world. For these reasons I think that, as a matter of law, the covenant sued upon was invalid, and our judgment must be for the defendant.

Application to enter judgment for defendant allowed.

HERBERT MORRIS, Limited, v. SAXELBY.

(House of Lords. [1916] 1 App. Cas. 688.)

Appeal from an order of the Court of Appeal affirming a judgment of Sargant, J. [1915] 2 Chan. 57.

The appellants were the plaintiffs and the respondent was the defendant in an action to enforce a covenant in restraint of trade, and the sole question at issue was as to the enforceability of the covenant.

The appellants carried on the business of engineers, their special and main line of business being the manufacture and sale of lifting machinery, particularly pulley blocks, runways and travelling cranes, for which they had acquired a great reputation. Their head office and works were at Loughborough, and they had branch offices in London, Manchester, Birmingham, Glasgow, Cardiff, Leeds, Newcastle, and Sheffield. They had no branch office but employed a traveller in Ireland. They were the largest makers of lifting machinery in the United Kingdom. The appellants had devoted much time and money to collecting and tabulating information of various kinds for use in their business. In particular they got out and arranged a large number of charts called E charts, which gave details of their manufacture and particulars of the strengths of the materials employed, and contained a large amount of technical information as the result of experiments made by the appellants and their employees. They also had drawings called L sheets, comprising tables and curves indicating the strength and composition of the materials required for any particular job. All these documents were treated as confidential, and though they were handed out from time to time to the appellants' employees, stringent precautions were taken to ensure their return.

The respondent on leaving school entered into the employment of the appellants in February, 1901, as a junior draughtsman, being then aged fifteen. In 1906 he became leading draughtsman in the department of pulley blocks, hand overhead travelling cranes, and hand overhead runways. In 1908 he was appointed resident engineer at the appellants' Cardiff branch, and in 1909 he became their manager and resident engineer in London. In 1910 he was sent back to Loughborough, where he took charge of departments connected with the sale of pulley blocks and with Admiralty contracts. On March 17, 1911, he entered into an agreement with the appellants whereby he was to be employed from February 7, 1911, as an engineer for two years

certain, and thereafter subject to four weeks' notice on either side, at a salary of £3. 17s. 6d. per week. And the agreement contained the following clauses:

"6. The employee shall not during his employment nor at any time afterwards divulge nor communicate to any person corporation or firm any information which he may receive or obtain in relation to the company's affairs and customers and all instructions drawings notes and memoranda made by the employee or which may come into his possession while engaged as aforesaid shall be the exclusive property of the company.

"7. In consideration of the agreement hereinbefore contained the employee covenants and agrees with the company their successors and assigns that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company whether under this agreement or otherwise howsoever either in the United Kingdom of Great Britain or Ireland carry on either as principal agent servant or otherwise alone or jointly or in connection with any other person firm or company or be concerned or assist directly or indirectly whether for reward or otherwise in the sale or manufacture of pulley blocks hand overhead runways electric overhead runways hand overhead travelling cranes or any part thereof or be concerned or assist as aforesaid in any business connected with such sale or manufacture."

These clauses were substantially a repetition of clauses contained in an agreement of July 16, 1906, which the respondent was required by the appellants to sign immediately on his attaining the age of twenty-one, when he was employed as leading draughtsman, except that the clause restricting the respondent from carrying on trade in competition with the appellants did not include in the prohibited articles electric overhead runways.

The respondent left the appellants' service on April 19, 1913. During the last six months of his service he attempted to obtain employment in various engineering firms which did not compete with the appellants, but having failed in these efforts, in May, 1913, he entered into the employment of Messrs. Derome, who carried on the business of engineers and manufacturers of lifting machinery at Bavay in France. On February 28, 1914, he left Messrs. Derome and entered into the employment of Vaughan & Sons, Limited, of Manchester, who were manufacturers of lifting machinery and competitors in trade of the appellants.

Thereupon the appellants commenced this action against the respondent claiming injunctions restraining him from committing breaches of clauses 6 and 7 of the agreement of March 17, 1911. At the trial, however, the appellants abandoned their claim under clause 6, and they did not claim to enforce the last words of clause 7 "or any part thereof or be concerned as aforesaid in any business connected with such sale or manufacture."

SARGANT, J., dismissed the action. The learned judge said that from

the point of view of the employers alone he was not prepared to hold that the covenant was unreasonable as regards either time or space, having regard to the very special character of the work, and if the question were one between a vendor and purchaser he would feel compelled to give effect to it; but he held that it was unreasonable to the defendant and prejudicial to the public and was therefore not enforceable. This decision was affirmed by the Court of Appeal by a majority (Lord Cozens-Hardy, M. R., and Joyce, J.; Phillimore, L. J., dissenting).

LORD PARKER OF WADDINGTON. My Lords, in the case of *Nordenfelt v. Maxim Nordenfelt Co.*⁶ Lord Macnaghten considered most, if not all, of the prior cases relating to contracts in restraint of trade and came to certain conclusions. I had to consider them in the case of *Attorney General of the Commonwealth of Australia v. Adelaide Steamship Co.* [1913] A. C. 781, and I adhere to everything I then said. As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy; and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties; and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and the covenantee, for though in one sense no doubt it is contrary to the interest of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long

⁶ This case is printed post, p. 109.

as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favor it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing. It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The court no longer considers the adequacy of the consideration in any particular case. If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is in my opinion equally reasonable that the covenantor should be able to subject himself to this restraint. The test of reasonableness is the same in both cases.

It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from this view. It would, indeed, entirely destroy the value of Lord Macnaghten's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public, though, as I pointed out in the case referred to, the onus of so showing would lie on the party alleging it.

My Lords, it appears to me that Lord Macnaghten's statement of the law requires amplification in another respect. If the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection.

In the Nordenfelt Case that which it was required to protect was the good will of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the good will of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the Nordenfelt Case. The good will of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment,

and if the purchaser is to take over such good will with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability inure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The good will of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavoring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which such a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.

As might be expected, where the cases are so numerous, it is not impossible to find dicta pointing to a contrary conclusion. I refer in especial to what was said by Parke, B., in *Mallan v. May*, M. & W. 653. But even here it is to be observed that counsel in argument supported the validity of the covenant, on the ground that it was no more than was necessary to prevent the defendant from availing himself of the knowledge he had acquired in the plaintiff's service to interfere with the plaintiff's customers. If a covenant restraining competition by an employee were in itself reasonable, it is difficult to see why the court has considered in almost every case whether such covenant could be justified as no more than sufficient to protect trade connection and trade secrets.

The point did not arise for actual decision until *Sir W. C. Leng & Company v. Andrews*, [1909] 1 Ch. 763. In that case the covenantor was a newspaper reporter. He did not in the course of his employment come across the covenantee's customers, nor was he entrusted by his employers with any confidential information whatever. The effect of the covenant, therefore, was merely to prevent him using his personal skill and knowledge within the limited area mentioned in the covenant; in other words, it was merely to preclude competition. In these circumstances, it was unanimously held that the covenant was bad.

In *Mason v. Provident Clothing & Supply Company*, [1913] A. C. 724, it was argued, apparently for the first time in this class of case, that an employer might reasonably say, "I will not have the skill and knowledge acquired in my employment imparted to my trade rivals," and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself.

This argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets. In fact, the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.

My Lords, it remains to apply what I have said to the particular circumstances of the present case. Mr. Herbert Morris, the managing director of the plaintiff company, very candidly admitted that the real object of the plaintiff company in imposing the restraint was to preclude competition on the part of the defendant after he had left the company's employment. The company objected, he said, to skill and knowledge acquired in its service being put at the disposition of any trade rival, and the skill and knowledge he referred to was the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all. To use Lord Shaw's metaphor in *Mason v. Provident Clothing & Supply Company*, it was "subjective," as opposed to "objective," skill and knowledge; or, to use the expression of Joyce, J., in this case, it was skill and knowledge "which were his own," and in no sense the plaintiffs' property. As directed against competition or against the use of this skill and knowledge, I am clearly of opinion that the restraint was in no way required for the plaintiffs' protection, and therefore unreasonable and bad in law.

An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business,

and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area around each of these centers, it might possibly have been supported as reasonably necessary to protect the plaintiffs' connection, but a restraint extending over the United Kingdom was obviously too wide in this respect.

With regard to trade secrets, I am not satisfied that the defendant was entrusted with any trade secret in the proper sense of the word at all. Mr. Walter boldly argued that the expression "trade secrets" ought to be extended so as to include everything which Mr. Morris claimed to be peculiar to the plaintiffs' method of carrying on their business.

I will assume that the matters referred to by Mr. Walter are in fact peculiar to the plaintiffs' business, though I can hardly regard Mr. Morris' uncorroborated evidence as very satisfactory proof that the practices in question were unknown to other firms. Still, the manner in which Sargant, J., dealt with this part of the case appears to me to be unanswerable. Though the defendant had access to the E charts, the L sheets, the drawings of special machines, the costs index, and other documents, all of which may be considered confidential, these documents were far too detailed for the defendant to carry away the contents thereof in his head. All that he could carry away was the general method and character of the scheme of organization practiced by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret. The same applies to the plaintiff company's system of standardizing mechanical apparatus capable of being used in more than one class of machine. The nearest approach that I can find in the evidence to anything in the nature of a trade secret is the mention of certain formulæ, said to be based on the plaintiffs' experience, and to be more trustworthy than Molesworth's formulæ for similar purposes.

During the course of the argument your Lordships asked for, but failed to obtain, these formulæ, and therefore I am unable to judge whether they are such that the defendant could carry them in his memory. I therefore cannot attach any great importance to them. It would be a point of some difficulty whether the possession by an employee of a single trade secret would justify a restraint as wide as that in the present case, but under the circumstances I do not consider that this point really arises.

In my opinion the case falls within your Lordships' decision in *Mason v. Provident Clothing & Supply Company*. The appeal therefore fails.⁷

⁷ The concurring opinions of Lords Atkinson and Shaw of Dunfermline are omitted.

"Recent decisions of the House of Lords upon the invalidity of many of these covenants when imposed upon employees in contracts of service have,

as I read them, effected, in more than one aspect of the subject, a much more fundamental change in hitherto accepted views upon it than has seemed to the learned judges of the Divisional Court to be the case. That is the main difference between us.

"Now, we are here dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy. Its modern developments have grown up under the shadow of the *'laissez faire'* school of economics, and, until recently, have, in consequence, been uniformly in the direction of extending the principle of freedom of contract in relation to such bargains a tendency that has not yet ceased to be operative when the covenant in question is one exacted from a vendor on the sale of the good will of his business. But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords, itself bound by comparatively few of the numerous previous decisions on the subject, took the opportunity in 1913, when the validity of a restrictive covenant entered into by an employee came in question before it, to examine the whole problem afresh, with the result that the supreme tribunal, for the guidance of every court, has now placed upon the permissibility of such covenants a limit which the general interest, including, of course, that of employees themselves, had not previously seemed to require. In consequence it must now, I think, be recognized in all courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service and the same covenant when found in an agreement for the sale of good will; and the dispute between the parties to this action must be decided with due regard to that difference. This declared difference is, as I have said, a matter of recent development, and although it has not been put forward by the House of Lords as a new departure, its effect upon previously accepted views has already been as complete as if it were. Moreover, it may be doubted whether all its incidental consequences have even now become apparent. * * *

"* * * The House of Lords in *Mason v. Provident Clothing & Supply Company*, [1913] A. C. 724, and in 1916 in the subsequent case of *Morris v. Saxelby*, [1916] 10 C. 688, defined the limited permissible effect of such a covenant; and the difference between it and one entered into by a vendor was then at length clearly emphasized. The subject is thus introduced by Lord Haldane in his speech in *Mason's Case*: 'It is no doubt as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the court to scrutinize agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the courts have to check, and the judges have to see that Lord Macnaghten's test is carefully observed.' Lord Shaw in the same case expresses the view that there is much greater room for allowing as between buyer and seller a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work.

"Proceeding upon these lines, the House of Lords has developed this distinction, and the following points may now, I think, be taken to be established.

"First, it is the covenantee, the respondent here, who has to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business. * * *

"Secondly—and this is established by the recent cases in the House of Lords—the restraint must be reasonable not only in the interests of the covenantee but in the interests of both contracting parties.

"Thirdly, and the most important of all. An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition *per se*, although a purchaser of good will is entitled to protect himself against such competition on the part of his vendor. * * *

"Fourthly, in the opinion at least of two learned lords, Lord Shaw and

Lord Moulton, previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration. * * *

"* * * In my view the necessary effect of the application of the principle on which *Mason's Case* and *Morris v. Saxelby* have both been decided has been to render obsolete the cases in which the courts have severed these restrictive covenants when acting on the view that being *prima facie* valid it was their duty to bind the covenantee to them as far as was permissible. It may well be that these cases are still applicable to covenants between vendor and purchaser, for upon such covenants the effect of Lord Macnaghten's test upon the law as previously understood has been little more than a matter of words, and Lord Moulton's observations, now to be referred to, have no direct application to such covenants. But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of Lord Moulton in *Mason's Case* necessarily applies. Lord Moulton there says this: 'I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master.' Then after a passage which does not apply to this case his Lordship goes on: 'and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably.'"

From the opinion of Younger, L. J., *passim*, in *Attwood v. Lamont*, [1920] 3 K. B. 571.

KEELER v. TAYLOR.

(Supreme Court of Pennsylvania, 1866. 53 Pa. 467, 91 Am. Dec. 221.)

WOODWARD, C. J.⁸ We agree with the plaintiff's counsel in the construction of the contract upon which this suit is founded. Keeler being a manufacturer of platform scales, and Taylor a mechanic, but not skilled in the mysteries of that particular manufacture, came together in a written agreement, whereby Keeler agreed to instruct Taylor in the art of making platform scales, and to employ him in that business at \$1.75 per day.

Taylor on his part engaged to attend faithfully to Keeler's interests whilst so employed, and to pay Keeler, or his legal representatives, \$50 for each and every of said scales which he, Taylor, should thereafter make for any other person than Keeler, except with Keeler's written consent, or which shall be so made in consequence of Taylor's imparting information to others.

Taylor, worked with Keeler seven years, and then set up for himself in the manufacture of scales, and this bill in equity is brought to compel him to account to Keeler at the rate of \$50 for every pair of scales he has manufactured on his own account. Not only is the plaintiff's case within the terms of the contract, but he, and his personal representatives, will have a right to call on Taylor for all his lifetime to account for every pair of scales he makes himself, or which shall be made by any person instructed by him. It is a tax or duty levied upon Taylor, not merely for his own industry for life, but for the industry of all who may derive their information from him. Such is the import of the agreement.

The plaintiff's bill is virtually for the specific execution of this agreement. The district court dismissed the bill without giving any reasons, and on appeal we are asked to restore it, and to decree on account in favor of the plaintiff.

We are of opinion that the contract was in restraint of trade and industry, and therefore that the bill was properly dismissed.

The general rule is, that all restraints of trade, if nothing more appear, are bad. This was the rule laid down in the famous case of *Mitchell v. Reynolds*, 1 P. Wms. 181. But to this general rule there are some exceptions, as, if the restraint be only particular in respect to time or place, and there be a good consideration given to the party restrained.

Now, admitting that the agreement in this case was founded in a sufficient consideration, is it reasonable to impose such a tribute upon the labor of a mechanic? Is not its direct tendency such as to restrain his skill in a useful art? And even if at law damages might be recovered for breach of such a contract, ought a court of equity to enforce it?

⁸ The statement of facts and a part of the opinion are omitted.

According to the doctrine of the cases, these questions will admit of no answers that are favorable to the plaintiff. He was not the inventor and patentee of scales, selling his rights to another. Nothing of that sort appears in the case. It was a sale merely of his handicraft, and whilst the parties were free to fix their own valuation of that, a contract that restrained the industry of the defendant, not in a particular locality, but everywhere, not for a specified period, but for a lifetime, was contrary to public policy and void.

If it were not void, however, a chancellor would regard the hardship of the bargain, and the prejudice to the public, and would withhold his hand from enforcing it, for such decrees are always of grace and not of right.

The decree is affirmed.

HERRESHOFF v. BOUTINEAU.

(Supreme Court of Rhode Island, 1890. 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.)

Bill for injunction by Julian L. Herreshoff against A. Boutineau. Defendant demurs to the bill.

STINESS, J. The complainant, director of a school of languages in Providence, employed the respondent to teach French from January 7, 1889, to July 1, 1889. The contract, in writing, provided that the respondent would not, during the year after the end of his service, "teach the French or German language, or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person or persons or institutions that teach them, in the said state of Rhode Island." The respondent's service ended July 1, 1889, after which time he gave lessons in French, in Providence. This suit is brought to restrain him from so doing within the time covered by this contract.

The respondent demurs to the bill, contending—First, that the contract is void on the ground of public policy, because it imposed a general restraint throughout the state; and, secondly, because it is unreasonable. Is the contract void? In view of these cases,⁹ we do not think it is now the rule in England that restraint throughout the kingdom is absolutely void.

In this country the cases have been quite similar to those in England. In the recent case of *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, Andrews, J., says: "It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases." In that case the defendant covenanted, for the

⁹ The court's review of the principal English cases down to *Davies v. Davies*, L. R. 36 Ch. Div. 359 (1887), is omitted.

period of 99 years, not to engage in the manufacture or sale of friction matches, within any of the states or territories of the United States, except Nevada and Montana. The complainant sought to restrain a breach of that covenant in New York, the respondent claiming that the covenant, being general as to New York, was void. But the court declared it to be valid, in a strong and thorough opinion, showing the history of litigation, and the tendency of recent judicial decisions upon this subject.

Taking this case in connection with *Navigation Co. v. Winsor*, 20 Wall. 64, we think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a state. Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience now, to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the state.

Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract; yet, when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. For example, if one has sold the good will of a mercantile enterprise, receiving pay for it, upon an agreement not to engage in the same business in the same state, for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business. In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail, and sending goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restric-

tion embracing the state, or even a larger territory, could not be said on that account to be unreasonable; for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the *Law Quarterly Review*, above cited: "Covenantees desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

Besides the matter of protection, the hardship of the restriction upon the party and the public should also be considered. In the present case, we think the restriction is unreasonable. Not as a rule of law because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the state, and that by reason of the small extent of the state, and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils from all parts of the state may come to Providence, as a center, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence, or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport; thereby admitting that the restriction is greater than the necessity.

The people of Newport, Westerly, and other places have the right to provide for education in languages, without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place who might leave the complainant, if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable; but we think it is unreasonable to go further. The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school, from teachers who may entice away his scholars, after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained.

O. & W. THUM CO. v. TLOCZYNSKI.

(Supreme Court of Michigan, 1897. 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469.)

MOORE, J. The complainant is the successor of the firm of O. & W. Thum, who were manufacturers of sticky fly paper. It filed a bill of complaint to restrain defendant communicating to others the secret processes and methods, and the knowledge of secret machinery, which were learned by him while in the employ of O. & W. Thum. The court below granted an injunction, as prayed in the bill of complaint. Defendant appeals.

The testimony is voluminous, and very conflicting. We are satisfied, however, that it establishes, by a very clear preponderance, as follows: The defendant entered the employ of O. & W. Thum in 1887. They at that time were manufacturing sticky fly paper by machinery, and from formulæ known only to themselves. They at that time had but one man and one boy in their employ. The business was carried on in the attic of the house, and in a small building in the back yard. The processes and machinery that were regarded as secret, and of great value to the firm, were used only by the members of the firm. As the business grew, it became necessary to employ more persons, and among others employed was the defendant. Because of the increase in the business and the employment of more persons, other precautions were taken, as the necessity grew for taking them. The public were excluded from the premises. The employes at one machine were not allowed to inspect other machines used in the manufacture, and were not allowed to visit all portions of the premises. Very rigid and careful requirements were made and enforced to guard the formulæ, the processes of manufacture, and knowledge of the machinery used, so that no one could learn them, or either of them, to the detriment of the firm.

The business of the firm steadily grew in magnitude, so that when defendant left its employ, in 1892, about \$100,000 was invested in the business, and a large number of persons were given employment. Shortly before this bill was filed, complainant received the following letter: "Grand Rapids, Mich., Jan. 7, 1893. The O. & W. Thum Co., City. Mr. Wm. Thum—Dear Sir: It is about fifteen months since I left your shops, and during that time have been more or less troubled by outside people in regards to fly paper and its manipulations at your works; not so much so until lately, when there were representatives from two large firms, one from Ohio, which was represented by the president and their attorney, which I looked up in G. R. Dun's, who quote them at \$500,000, who were here for one week, and were directed by some people here in the city to me. They told me that they had sufficient artillery to put the paper on the market, but were a little short on cavalry in its workings; also told me that they were ready at any time to make arrangements,—that is, as soon as I say yes. I can show

letters from the above firm and others. I have not said a single word of its manufacture since I left you, but do not think its my place to keep mum unless you desire it. Awaiting your early reply, I remain, yours, truly, A. A. Tloczynski." It very soon became evident that defendant was negotiating with others to engage in the manufacture of the same product the complainants were making, and this bill was filed.

The terms of employment were not reduced to writing, and there is a sharp conflict of testimony between the defendant and O. & W. Thurn as to the terms of his employment, so that it becomes necessary to consider carefully all the testimony in the case to arrive at the truth. One cannot read all the testimony, in the light of the facts and circumstances surrounding the condition of the business at the commencement of the defendant's employment, and its subsequent development and growth, without coming to the conclusion that the defendant and his employer regarded his relation to them as a confidential one, and that he should not disclose or make improper use of the secrets of the business. The conclusion is irresistible that defendant would not have been employed, and information which was imparted to him would not have been conveyed, if it had been understood that he might sever his relations with his employers at any time, and sell the valuable information which had been imparted to him whenever he could find a market. The inception, growth, and development of the business; the manner in which it was conducted; the care taken to exclude the public from means of obtaining knowledge of the processes; the fact that, when new machinery was to be constructed, part of it was got at one place, and part at another, so that no person outside of the members of the firm and their immediate employés, should see a completed machine in operation; the fact that employés in one department of the manufactory were not allowed in other departments; and the care which was taken to prevent employés from obtaining knowledge of any branch of the business, except that in which the employé was immediately engaged, of all of which the defendant had knowledge,—all indicate conclusively that the business and processes were secret, and that no one knew that fact better than the defendant. We think it clearly established by the testimony that the employment was upon the agreement that defendant would not use the information imparted to him to the harm of his employer.

In our view, the only important question involved in the case is whether an employé, when his employment terminates, may make use of secrets confided to him by his employer, necessary to be confided to him in the conduct of the business, when it is understood and agreed that he shall not make use of the secret knowledge so imparted to the detriment of the employer, and, if he attempts so to do, may he be restrained by writ of injunction?¹⁰

¹⁰ Only so much of the opinion as relates to the validity of the contract is printed.

It is the contention of the defendant that the contract sought to be enforced is void as against public policy because it is in restraint of trade; citing *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Association v. Starkey*, 84 Mich. 76, 47 N. W. 604. These cases are not in point. They are cases where the purpose of the contract was to create a monopoly, by providing by contract that established industries should cease to do business, which, of course, is unlawful; but that is not the purpose of the contract under consideration. Here processes and machinery have been invented which the owners believe would be of great value to them if they could be used upon a large scale. To use them upon a large scale required the employment of a number of persons, to some of whom some of the secrets of the business and the machinery must be disclosed. If these secrets were disclosed to others, who might use them to establish a business of like character, they would cease to be valuable to the owner. Is there anything unreasonable in enforcing an agreement that such secrets shall not be disclosed by the employé? It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, for the public has no right to the secret. See *Taylor v. Blanchard*, 13 Allen, 372, and cases cited; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345.

We cannot see how it can be against public interest to allow an employer to make such conditions of employment with his employés as will give him the fullest protection to his property right in his process or invention, and at the same time enable him to employ a great many employés in its production. To enable one to do this would be a benefit to the public in many ways. It would secure employment to more persons than would otherwise be employed, and a larger output would be made of a useful article. The evidence discloses that it does not require a man of special skill to do the work done by defendant when in the employ of the predecessors in business of the complainants. To restrain him from making use of what he has not discovered is not an injustice to him, and does not abridge his right to work along those lines which would not be harmful to those to whom he has sustained a position of confidence. It is to the advantage of both parties that such a contract should be allowed. By means of it the defendant secured employment which he could not have secured without it, and at the same time his employers were secured against competition which might be ruinous. *Beal v. Chase*, 31 Mich. 531.

The decree of the court below is affirmed, with costs. The other justices concurred.

TAYLOR IRON & STEEL CO. v. NICHOLS.

(Court of Errors and Appeals of New Jersey, 1908. 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. [N. S.] 933, 133 Am. St. Rep. 753.)

Appeal from Court of Chancery.

Bill by the Taylor Iron & Steel Company, against Wesley G. Nichols and others. Decree for complainant, and defendants appeal.

SWAYZE, J. The bill seeks to enjoin Nichols from divulging to any one other than the complainant any information known to him at the time of the agreement hereafter to be mentioned, or acquired by him during the term of the agreement relating to the making of steel that may have been used in the complainant's works, and from divulging treatments, processes, and secrets known to or used by him in the complainant's works, and from devoting during the term of said agreement any part of his time, skill, labor, and attention to the service of any one except the complainant. It also seeks to enjoin the other defendant from employing Nichols or using any information acquired from him relating to the process of steel making that may have been used in the complainant's works.

The complainant has been engaged since 1891 in making steel under what is known as the Hadfield process and patents. Hadfield in 1891 had licensed Howe and others to use his processes, and they had agreed to keep the same secret until January 1, 1902. Subsequently the complainants succeeded to the rights of the licensees. In 1892 Hadfield granted another license to the complainant covering projectiles, and they agreed to keep the process secret until December 31, 1903. Afterwards, in 1901, the agreement for secrecy was extended to July 1, 1908. Meantime, on March 16, 1896, the complainant had employed the defendant, and he had agreed in writing that he would not before January 1, 1902, make known to any person any information which he should receive at the complainant's works. Nichols continued in plaintiff's employ from 1896 to July, 1905. On March 15, 1905, he entered into a new agreement in writing for the term of five years from March 1, 1905. It is this agreement which the complainant's bill seeks to enforce. The important paragraph reads as follows:

"(2) The said Wesley G. Nichols agrees that he will devote his entire time, skill, labor, and attention during the term of this agreement to the service of the Taylor Iron & Steel Company, and that he will at all times faithfully perform the duties that may be assigned to him by the management of the said Taylor Iron & Steel Company to the best of his skill and ability for the compensation aforesaid, and that he will not at any time directly or indirectly, during the term of this agreement or afterwards, divulge to any person, firm, or corporation, except to the Taylor Iron & Steel Company and its officers, any information of any nature now known to him, or hereafter acquired by him during the term of this agreement, relating to or regarding any pro-

cess of steel making or moulding or treating steel that may have been, is now, or may be hereafter during the term of this agreement, used in the works of the Taylor Iron & Steel Company, and that he will at all times hold inviolate the treatments, processes and secrets known to or used by him in the works of the said Taylor Iron & Steel Company."

The validity of this agreement is assailed by the defendant on several grounds. We think it is necessary to consider only the objection that it is invalid because it constitutes an excessive restraint of trade.

The rule of this state is that a contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37, *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348, both of which were cited with approval by this court in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612.

Where the contract relates to personal services of a special, unique, or extraordinary character which can be performed by no one else and there is a negative covenant, the court sometimes enforces the negative covenant by injunction, as in *Lumley v. Wagner*, 1 De G. M. & G. 604. But the jurisdiction of equity rests upon the inadequacy of the legal remedy. *Pomeroy*, § 1344. The courts of other jurisdictions, as well as our own courts in the cases cited, have shown a reluctance to extend the jurisdiction. *Whitwood Chemical Co. v. Hardman* (1891) 2 Ch. 416, 60 L. J. Ch. 428; *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180. The present case does not show that Nichols' services were of so special, unique, or extraordinary character that an injunction should issue.

The contract not only forbids Nichols to disclose any secret of the complainant, but also any knowledge he might have relating to the process of making steel that may have been used in the complainant's works, whether matter of common knowledge or not, whether known to him before he entered their employment or not; and it also requires him to hold inviolate not only the secrets of the complainant, but his own secrets, if he had any, and treatments or processes, whether secret or not. The necessary result of the enforcement of the contract would be that Nichols must either work for the complainant or remain idle; and, since the restraint is unlimited in point of time or place, he might at the option of the complainant after the expiration of five years be without employment for the rest of his life at the only trade he knows. Such a restraint savors of servitude, unrelieved by an obligation of support on the part of the master. The courts have refused to enforce similar contracts. *Alger v. Thacher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; *Albright v. Teas*, 37 N. J. Eq. 171.

The learned Vice Chancellor perceived the difficulty we have men-

tioned, but held that the agreement was limited to processes in use by the complainant which were not known to Nichols until they were disclosed to him by the complainant. If we were able to adopt this restricted meaning, we should still think the covenant an unreasonable restraint. Some of the secret processes were those known as the Hadfield processes which had been communicated to the defendant under the contract of 1896. That contract bound him to secrecy only until January 1, 1902, the same time fixed by Hadfield's original license to Howe. By necessary inference, after that time he was no longer bound. "*Expressio unius, exclusio alterius.*" On the Vice Chancellor's construction of the agreement of 1905, he bound himself forever not to disclose secrets learned under the contract of 1896. There is nothing to show that circumstances had so changed as to require a perpetual restraint in 1905, when a restraint for six years only had been adequate in 1896, or that reasonable protection of the complainant required a perpetual restraint of the defendant from disclosing what by agreement he had been entitled to disclose for the three years preceding. The complainants themselves are restrained only until July 1, 1908. In our judgment the complainant's case fails as far as it rests upon the written contract.¹¹

SECTION 2.—AFTER THE SALE OF A BUSINESS

MUNSEY v. BUTTERFIELD.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 492.)

W. ALLEN, J.¹² By the agreement between the parties, made on February 24, 1880, the defendant agreed to accept and pay for certain personal property, to be delivered to him by the plaintiff on the 1st day of the next April. This action is brought to recover damages for the refusal of the defendant to accept the property. To maintain it, the plaintiff must prove that he offered, or was ready, to deliver the property. A material part of the property to be delivered was, as stated in the agreement, "The good will of said Munsey's milk route lying in West Somerville, East Somerville, North Somerville and Charlestown." This contract, called a sale of the good will of Munsey's milk route, was really, like the sale of the good will of any business, an agreement by the plaintiff that he would retire from it, and would allow the defendant to enjoy the benefits and advantages of it, and would do nothing to impair or injure it. This agreement was implied in the transaction, and in fact constituted the contract of sale of the good will of the milk route on the part of the plaintiff. *Dwight v.*

¹¹ The remainder of the opinion, considering other points, is omitted.

¹² The statement of facts is omitted.

Hamilton, 113 Mass. 175. The defendant did not agree to pay for the right to run a milk route over the territory. The plaintiff did not have that exclusive right. Neither did he agree to pay for the mere right or opportunity of getting customers in consequence of the plaintiff's withdrawal from the route. This is by no means all that constitutes the good will of a business; that is, as was said by Chief Justice Bigelow in *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748, in language applied to such a sale by one member of a firm to another, but equally applicable to a sale to a stranger, "the benefit or advantage which had accrued to the firm, in addition to the value of their property, derived from their reputation for promptness, fidelity and integrity in their transactions, from their mode of doing business, and other incidental circumstances, in consequence of which they had acquired general patronage from constant and habitual customers."

In the case at bar, the right which the defendant was to acquire was the right to the business of running the milk route as the circumstances, the conduct and the influence of the plaintiff had made it, and this right could be acquired only by the agreement of the plaintiff not to interfere with the business—not to use the opportunities and influences which had built it up to impair it. If the plaintiff, when he made the offer to deliver the property, upon which he relies, intended, and gave the defendant to understand that he intended, not to keep his implied agreement, which constituted a material part of the right or property to be sold and delivered, he did not make such an offer as the defendant was bound to accept, and the refusal of which would give the plaintiff a cause of action. The defendant was justified, by the conduct and declarations of the plaintiff, in believing, not only that he intended to run a milk route in competition with the defendant over a part of the territory included in the route proposed to be sold, but to run it in opposition to that, and not only to obtain new customers, but to divert old ones from the defendant; and that the plaintiff did not offer, and did not intend, to carry out his agreement.

Angier v. Webber, *ubi supra*, was a bill in equity for an injunction to restrain the defendants from violating an agreement to do nothing to impair or injure the good will in a teaming business between Boston and Somerville, which had been sold by the defendants to the plaintiff. The defendants bought the business of other licensed stands near that sold, and engaged in the business, but did not solicit the customers of the plaintiff except by holding themselves in readiness to do business. It was held that this was a breach of the agreement. Chief Justice Bigelow said: "These facts show that the defendants have done acts which tend directly to deprive the plaintiff of the benefit of the reputation of the old firm, to take away from him the patronage which appertained to it, and to draw away the business of its habitual customers, to which he had acquired a right by the purchase of the good will." This was even less than the plaintiff in the case at bar gave the defendant to understand that he intended to do.

We think that the plaintiff did not offer to the defendant the good will of the milk route, and that the defendant was justified in refusing to accept what was offered. In the opinion of a majority of the court, the ruling that the plaintiff could not maintain his action was correct.

Exceptions overruled.

VON BREMEN v. MacMONNIES.

(Court of Appeals of New York, 1910. 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. [N. S.] 293, 21 Ann. Cas. 423.)

WILLARD BARTLETT, J.¹³ On May 10, 1904, one of the plaintiffs, Henry Von Bremen, and the defendants Frank MacMonnies and William Von Elm entered into a copartnership under the firm name of Henry Von Bremen & Co., subsequently changed to Von Bremen, MacMonnies & Co., for the transaction of an importing and commission business in buying, taking on commission, and selling all sorts of fancy groceries, which copartnership by the terms of the agreement was to continue until the 30th day of April, 1909. On February 10, 1909, the defendants sold to the plaintiff Henry Von Bremen "all their right, title, and interest in all the assets, good will, trade-marks, and other property of every name and nature wheresoever located of the firm of Von Bremen, MacMonnies & Co., together with all debts and things in action due or owing by or from any person or corporation to said firm." The consideration for this transfer was the payment of \$44,000, which was \$1,500 more than the book value of the property transferred. There was no specific valuation of the good will. The plaintiffs Henry Von Bremen and Herman T. Asche, under the firm name of Von Bremen, Asche & Co., have succeeded to the business thus purchased by the plaintiff Henry Von Bremen individually.

Shortly after his purchase, the defendants formed a partnership under the firm name of MacMonnies & Von Elm for the transaction of a similar business in fancy groceries. In the competition which thus arose the defendants have done or threatened to do various acts which the plaintiffs contend have a tendency to lessen or destroy the good will of the business which they acquired from the defendants by means of the transfer which has been mentioned. The present suit was brought to enjoin such acts. The trial court, by its interlocutory judgment, granted a portion but not the whole of the relief for which the plaintiffs prayed. It enjoined the defendants from using the cable address of the old firm, which was "MacMonnies"; from using a list of 2,200 dealers in fancy groceries which had been compiled by the old firm; and from using labels, brands, trade-marks, bottles, tins, and other packages, such as were exclusively owned or controlled by the old firm. The interlocutory judgment also directed an accounting for

¹³ The statement of facts is omitted.

the profits realized by the defendants and an assessment of the damages sustained by the plaintiffs.

Upon their appeal to the Appellate Division, the plaintiffs obtained some additional relief, but still not as much as they desired. The injunction granted at Special Term was extended so as to enjoin the defendants from soliciting the agency for the sale of articles of which the old firm had the exclusive agency and from soliciting orders for goods packed under special labels, trade-marks, and brands devised for the old firm for special customers. One member of the Appellate Division thought that the defendants should also be restrained from soliciting any of the customers of the old firm, but a majority of the court refused to go as far as this. The principal question presented by the plaintiffs' appeal to this court is whether the injunction should be thus extended.

The answer to this question depends upon the meaning to be given to the term "good will" in the transfer of the business of the old firm of Von Bremen, MacMonnies & Co. to the plaintiff Henry Von Bremen on February 10, 1909. If the law assigns a definite meaning to the term as used or implied in the voluntary transfer of a business, it must be presumed that such was its signification in this contract. We have to inquire, then, what are the restraints which the law imposes upon the assignor of the good will of a business, who transfers the same voluntarily, and not as the result of bankruptcy proceedings or under like compulsion.

The principal definitions of good will were fully stated and discussed by Judge Vann in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126, and it is not necessary to repeat that statement or discussion here. Of all the noteworthy definitions the narrowest is probably that of Lord Eldon, who, in 1810, defined good will as "the probability that the old customers will resort to the old place." *Cruttwell v. Lye*, 17 Vesey, Jr., 335, 346. On the other hand, one of the broadest definitions is that suggested in 1859 by Vice Chancellor Page-Wood, who declared that good will included "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." Again, he said: "Good will must mean either advantage * * * that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the benefit of the business." *Churton v. Douglas*, 2 M., D. & De G. 294.

Whatever definition of good will may be adopted, however, it appears to have been uniformly held that in case of a transfer thereof, the assignor, in the absence of an express agreement to the contrary, may carry on a similar business in the same locality. The question which has given most trouble to the courts in such cases has related to

the right of the vendor of the good will to solicit business from the customers of the old firm. In England the controversy on this subject extends from the case of *Labouchere v. Dawson*, Law Reports (13 Equity) 322, decided by Lord Romilly, Master of the Rolls, in 1872, to *Trego v. Hunt*, Law Reports, 1896 (Appeal Cases) 7, decided by the House of Lords in 1895. *Labouchere v. Dawson* was the case of a sale of a brewery business upon the death of one of two partners. The surviving partner set up business as a brewer—there being no stipulation to prevent him from so doing—and solicited orders from customers of the old firm. Lord Romilly held that although he might go into the brewing business himself and publicly advertise that business, he could not lawfully apply to any customer of the old firm, “either privately by letter, personally, or by a traveler, asking such customer to deal with the defendant and not with the plaintiffs.”

Another distinguished Master of the Rolls, Sir George Jessel, laid down the same rule in *Ginesi v. Cooper & Co.*, 14 Chancery Division, 596, decided in 1880, and went still further, declaring that he was prepared to hold, if the question had been raised, that the assignor of the good will could not even deal with the customers of the old firm, although they came to him unsolicited. The same learned judge carried this view of the law into effect in a subsequent case (*Leggott v. Barrett*, 15 Chancery Division, 306), where he granted an injunction which forbade the vendor of a business not only from soliciting trade from the customers of the former firm, but also from dealing with such customers at all. The Court of Appeal, however, vacated the latter part of the injunction. Shortly afterward the same court held that the doctrine of *Labouchere v. Dawson*, *supra*, against the solicitation of business from customers of the former concern did not apply and should not be extended to cases of compulsory alienation, so that “if the assignees of a bankrupt sell his business and good will the purchaser cannot restrain the bankrupt either from commencing a similar business himself or from soliciting his old customers to deal with him in his new business.” *Walker v. Mottram*, 19 Chancery Division, 355.

Although the decision last cited apparently sanctioned the rule laid down in *Labouchere v. Dawson*, the doctrine of that case was distinctly overruled by two out of the three judges of the Court of Appeal (*Baggallay and Cotton, L. JJ.*, against *Lindley, L. J.*) in *Pearson v. Pearson*, 27 Chancery Division, 145, decided in 1884. The rule that the vendor of a partnership business may not solicit trade from the customers of the old firm was rejected and an injunction which had been granted prohibiting such solicitation was dissolved upon appeal. The law as thus declared remained unquestioned for more than 10 years. It was during this period that the case of *Marcus Ward & Co. v. Ward*, 15 N. Y. Supp. 913, was decided by the General Term of the Supreme Court in the First Department, expressly following *Pearson v. Pearson* as the latest expression of judicial opinion in England on the subject. The question does not appear ever to have reached this

court until now. It finally went to the House of Lords in 1895, in the case of *Trego v. Hunt*, Law Reports, 1896 (Appeal Cases) 7, where it received elaborate consideration in opinions by Lord Herschell, Lord Macnaghten, and Lord Davey, resulting in a disapproval of the decision of the Court of Appeal in *Pearson v. Pearson* and a restoration of the doctrine of *Labouchere v. Dawson*.

The substance of the decision of the House of Lords in *Trego v. Hunt* may be briefly stated. The sale of the good will of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. The obligations imposed upon the vendor in the case of the sale of the good will are not necessarily the same under all circumstances. Lord Herschell conceded it to be the settled law that whenever the good will of a business was sold the vendor did not, by reason only of that sale, come under a restriction not to carry on a competing business. In cases where a partnership has been dissolved by effluxion of time or death, he thought it would be absurd to hold that those who formerly constituted the firm or their survivors should be restrained from carrying on what trade they pleased. But it does not follow "that because a man may by his acts invite all men to deal with him, and so amongst the rest of mankind invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. * * * It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable and does not result from any act of his. * * * But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm and of the knowledge of that connection which he has previously acquired to take that which constitutes the good will away from the persons to whom it has been sold and to restore it to himself." Lord Herschell deemed it immaterial to consider whether, on the sale of a good will, "the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor." He was satisfied that the obligation existed and that it ought to be enforced by a court of equity.

Lord Macnaghten, in his opinion in *Trego v. Hunt*, thus summarizes the various ways in which the doctrine of *Labouchere v. Dawson* may be supported: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he

has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different terms and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale; to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The good will, which the owner thereof parts with in invitum, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination pursuant to the articles of copartnership, is a lesser property than the good will which is the subject of a voluntary sale and transfer by the owner for a valuable consideration. In the first class of cases the former owner remains under no legal obligation restricting competition on his part in the slightest degree; in the second class of cases the former owner, by his voluntary act of sale, has excluded himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from customers of the old business. To this extent this good will is a more valuable property than the good will of a business which goes to a trustee in bankruptcy or a receiver or survivor of a partnership in liquidation. The good will which is the subject of a voluntary sale is, therefore, a different thing from the good will which the owner parts with perforce or under compulsion. This is a necessary implication from the principle upon which *Labouchere v. Dawson* and *Trego v. Hunt* were decided.

The necessity for the distinction which the law thus makes may readily be illustrated. If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale, not to solicit trade from customers of the old firm, merchants who had been in trade as partners of undesirable associates would constantly find themselves, by the mere fact of the dissolution of the firm they desired to leave, disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free, affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself as against the vendee of any special knowledge or advantage derived by him from the business whose good will he has voluntarily sold.

Courts of high repute in this country have adopted the same view as that of the House of Lords in *Trego v. Hunt* in reference to the right of a voluntary assignor of the good will of a business to solicit trade from old customers. It obtains in Massachusetts, New Jersey, Michigan, Rhode Island, Illinois, and Pennsylvania. *Hutchinson v. Nay*, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390;

Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Wentzel v. Barbin, 189 Pa. 502, 42 Atl. 44. Connecticut seems to be the only state in which a court of last resort has entertained a contrary view. Cottrell v. Babcock P. P. M. Co., 54 Conn. 122, 6 Atl. 791. The rule thus sanctioned in England and in so many states of the Union commands our approval, and we feel bound to give it our assent in answering the questions certified to us in the present case.

It is suggested in the opinion of the Appellate Division that the sale of the good will in this case was not really voluntary, but should be regarded as compulsory inasmuch as it merely anticipated by a few weeks the actual termination of the copartnership and was made as an alternative of a liquidation. It seems to us, however, under the findings, that it must be deemed to have been a voluntary transaction no matter how powerful were the motives which led the parties to enter into it. It was a thing which they were at liberty to do or to refrain from doing; and hence the sale was of a character which falls within the doctrine that has been discussed.

The interlocutory judgment must therefore be modified by extending the injunction so as to forbid the defendants from soliciting business from any customers of the former firm of Von Bremen, MacMonnies & Co., and as thus modified affirmed, with costs to the appellants.¹⁴

¹⁴ "In the contract terminating the partnership relation which had existed between Cottrell and Babcock, it is provided that no business shall thereafter be carried on in the name of that firm; thus reserving to each the full right to the use of his name. Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing presses. By purchasing the good will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good will was in his mind. Presumptively he obtained all that he desired. At any rate the express contract is the measure of his right; and since that conveys a good will in terms, but says no more, the court will not, upon inference, deny to the vendor the possibility of successful competition, by all lawful means, with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and, by advertisement, circular, card, and personal solicitation, invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always, when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm.

"That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here, and barred personal solicitation. They permit the vendor of a good will to establish a like business at the next door, and, by the potential instrumentalities of the newspaper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely, personal solicitation. To deny him the use of the newspaper and general

PIERCE v. FULLER.

(Supreme Judicial Court of Massachusetts, 1811. 8 Mass. 223, 5 Am. Dec. 102.)

This was an action of debt, in which the plaintiff declared that the defendant, by his obligation under his seal, and for the consideration of one dollar, agreed not to run a stage, between Boston and Providence, in opposition to the plaintiff's stage, in the penalty of two hundred and ninety dollars, and averred that the defendant, in violation of his agreement, had run a stage between those two places, by which he had forfeited that sum, to recover which the action was brought.

To this declaration the defendant pleaded several pleas in bar:

First. That he hath not, since the sealing of the said obligation, run a stage in opposition, etc., and tenders an issue to the country, which is joined by the plaintiff.

Secondly. That at the time of making the said writing obligatory, he was and for a long time before had been engaged in the business of running stages from Boston to Providence as his occupation; and that the sum of one dollar in the plaintiff's declaration mentioned, as the consideration paid by him to the defendant for making and executing the said writing obligatory, was not a sufficient and adequate consideration to render the same good and valid in law to restrain him from pursuing his occupation aforesaid; wherefore he run stages on the said road after making and executing the said writing obligatory, as he well and lawfully might do: and this, etc., wherefore, etc.

To this plea the plaintiff, in his replication protesting that one dollar is a sufficient consideration, etc., avers that before the making, etc., viz. on the ——— day of, etc., the defendant was the owner of an old stagecoach and one poor horse, both of the value of \$190 and no more; which coach and horse the defendant was then using and employing as a part of the line, etc., and it was agreed between him and the plaintiff, that the plaintiff should purchase of the defendant his said stagecoach and horse, and also all privileges, benefit and profit which he had had and enjoyed, and which would accrue to the plaintiff from his becoming a proprietor in the said line, etc., and that the plaintiff should pay the defendant therefor the sum of \$290; and that the de-

circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do except upon express agreement. But, possibly, the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not, upon inference, to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law."

Per Pardee, J., in *Cottrell v. Babcock Printing Press Mfg. Co.*, 54 Conn. 122, 138 et seq., 6 Atl. 791, 797 (1886).

fendant in consideration thereof would not from that time run any stage, etc., that in pursuance of the said agreement the plaintiff purchased the said stagecoach and horse, together with all the privileges, etc., and the defendant made and executed the writing obligatory declared on; whereupon it became unlawful for the defendant to be concerned in the business of running stagecoaches on the said road in opposition to the line of stagecoaches in which the plaintiff was a proprietor: and this, etc., wherefore, etc.

The defendant in his rejoinder traverses the said agreement, and tenders an issue to the country, which is joined by the plaintiff.

Thirdly. That long before and at the time when, etc., the defendant was and had been engaged in the business of running stages from Boston to Providence, as his occupation; by reason whereof the said bond was void in law, being in restraint of trade and business; wherefore he did run stages, etc., as he well and lawfully might do, and this, etc., wherefore, etc.

To this plea the plaintiff demurs generally, and the defendant joins in demurrer.

Upon the issues joined as aforesaid to the country, the jury returned a verdict for the plaintiff upon the first, and for the defendant upon the second.

SEDGWICK, J., delivered the opinion of the court.

If the obligation declared on in this case be against law the plaintiff must fail in his action; if not, the defendant's third plea in bar must be adjudged bad.

Bonds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. But bonds to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration. And in this case, the defendant might restrain himself by his agreement from running a stage on the particular road between Boston and Providence, on a liquidated penalty, for a reasonable and good consideration. And if it does not appear whether the contract was or was not made on good consideration, so that the contract may be either good or bad, it is the *prima facie* presumption of law that the contract is bad, because it is to the prejudice of trade and honest industry, because the mischief to one party is apparent, and the benefit only presumptive, and because the apparent mischief is not merely private, but also public. Therefore all contracts barely in restraint of trade, where no consideration is shewn, are bad. But in cases of a limited restraint of trade, where it appears from the special circumstances that the contract is reasonable and useful, shall be good. And the consideration must always be shewn, that the contract may be supported by the special circumstances, which induced the making of it. Of these circumstances the court must judge; and if upon them it appears to be a just and honest contract, it will be maintained.

From examining the pleadings in this case, all that can be collected respecting the contract is that, before and at the time it was made, the defendant was in the occupation of running a stage on the road between Boston and Providence; that when the contract was made, the plaintiff either had set up, or contemplated setting up a stage on the same road; and that in consideration of one dollar, paid by the plaintiff to the defendant, the latter agreed that he would not run a stage on that road, in opposition to the plaintiff's stage, on penalty of two hundred and ninety dollars.

The public appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage; for it could not be in opposition to the plaintiff's stage. And it is indifferent to the public, which of these run a stage. It also appears from the contract, that the benefit to the plaintiff is not merely presumptive, but evident; as he must derive a certain advantage from excluding a rival stage from this road. But an inconvenience to the defendant from the contract is also apparent; for he quits his present occupation, which we ought to presume to be beneficial to him, as the plaintiff has stipulated for the forfeiture of two hundred and ninety dollars to be paid by the defendant, if he shall break the contract. To this inconvenience the defendant may voluntarily subject himself, for *volenti non fit injuria*. The contract, for aught that appears, was made fairly and without imposition: and a breach of it is manifestly a damage to the plaintiff.

The principal question then is, whether the consideration of one dollar is sufficient to support this contract. A distinction between *assumpsits* and bonds with penalty in restraint of trade was formerly adopted; the former being supported, because a judgment could give the plaintiff reasonable damages for the nonperformance, while the latter were adjudged void, because the whole penalty was forfeited on a breach of the condition. 3 Lev. 241, *Clerke v. The Taylors of Exeter*. There is here no reason for the distinction, for on the breach of the condition of the bond, the obligee can recover only the damages he has sustained by the breach. Perhaps there was never any good reason for the distinction; for if the bond was executed for good consideration, the penalty ought to have been considered at law as the liquidated damages for the breach.

The contract in the present case is not in the form of a bond with a penalty, but although unskillfully drawn, it is to be considered as a covenant with the damages liquidated by the parties, as a compensation for the breach, if the defendant should choose again to run a rival stage.

The parties were competent in law to make a contract imposing a limited restraint on the defendant's trade for the plaintiff's benefit, and without injury to the public. They were competent to determine on what consideration it should be made, and to liquidate the damages if it should be broken.

The consideration of one dollar is in law a valuable consideration. It would be sufficient to pass by sale the defendant's stage and stage horses, where no fraud or imposition was practiced. The parties have considered it as reasonable and adequate; and the defendant, by honestly fulfilling his agreement, might have protected himself from the forfeiture.

But he has broken it, and he shall not be admitted to say, that although the contract was fairly and honestly made, and for a valuable consideration to which he consented, the consideration was inadequate, that he made a bad bargain, and that when the plaintiff has suffered by the breach of it, he shall be relieved from the terms to which he had voluntarily submitted.

There is an old case determined when contracts in restraint of trade were confined in narrow limits, in which the apparent consideration was as inadequate as that in the present case is supposed to be. It is the case of *Bragg v. Tanner*, cited in *Broad v. Jollyfe* in *Cro. Jac.* 597. There the defendant, in consideration of ten shillings, promised the plaintiff to pay him an hundred pounds, if thenceforward he kept any draper's shop in Newgate Market; and the contract was adjudged good, and the plaintiff had judgment.

It is the opinion of the court, that the defendant's third plea in bar is bad, and no sufficient answer to the plaintiff's declaration.

From the opinion now declared, it results that the issue tried in this case arising upon the second plea in bar was wholly immaterial. That plea merely alleges the defendant had, for some time before making the contract declared on, been engaged in running a stage between Boston and Providence, and that one dollar was not an adequate consideration to restrain him from pursuing that business. To this plea there is a replication, in substance, that other and farther considerations besides the one dollar were in fact given by the plaintiff to the defendant, to induce him to enter into the contract. Then follows a rejoinder negating that fact, and an issue which it tenders is joined. This issue was found in favour of the defendant. But as the contract, from the terms of it, appears to be binding on the defendant, without further consideration than that expressed in the deed; it is of course immaterial whether there was, or was not, any further consideration than is expressed in the deed.

Of consequence it appears from the whole record, that the plaintiff is entitled to judgment.

TAYLOR v. BLANCHARD.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 370, 90 Am. Dec. 203.)

Contract upon an agreement in writing entered into between the plaintiff and defendant, providing that they should form a partnership together in the art, trade or business of manufacturing and selling shoe cutters, and all things thereto belonging, for one year from March 17, 1862, and for such further time as the parties should mutually agree upon. "And the said Blanchard for himself, his heirs, executors, administrators and assigns, further covenants and agrees to and with the said Taylor, his executors, administrators and assigns, that at whatever time the said copartnership shall be determined and ended, he, the said Blanchard, shall not nor will at any time or times hereafter, either alone or jointly with, or as agent for, any person or persons whomsoever set up, exercise or carry on the said trade or business of manufacturing and selling shoe cutters, at any place within the aforesaid commonwealth of Massachusetts, and shall not nor will set up, make or encourage any opposition to the said trade or business hereafter to be carried on by the said Taylor, his heirs, executors, administrators or assigns, nor do any act, matter or thing to the prejudice thereof, and shall not nor will divulge or make known to any person or persons whomsoever, any of the secrets, accounts or transactions of, or relating to, the said copartnership so heretofore carried on between them, the said Taylor and Blanchard, as aforesaid." And the sum of \$1,000 was fixed upon as liquidated damages, in case of a violation of the above agreement.

At the trial in the superior court, before Vose, J., it appeared that at the date of the above agreement the plaintiff was and had for several years been engaged in the manufacture and sale of shoe cutters, at Marlboro, Massachusetts. The manufacture of said articles was then and now is an art, and can only be carried on by persons instructed in the same, and the business was then confined to the plaintiff and three other parties; one in Sturbridge, one in Worcester, and one in Stoneham. The plaintiff at that time was doing a large and profitable business in said manufacture and sale. The defendant was wholly ignorant of the business. On the 17th day of March, 1862, the plaintiff received the defendant into partnership under the agreement, which partnership was continued until February 7, 1865, when it was dissolved by mutual consent. During this time, the defendant became well acquainted with the business and its customers. Upon the dissolution, the plaintiff took the business of the firm, and still continues it at Marlboro and Boston. Before the commencement of this action, the defendant, without the plaintiff's consent, set up the same business in Boston, with a new partner, and traded with and supplied the customers of the plaintiff.

Upon these facts, the judge directed the jury to return a verdict for the defendant, which was accordingly done; and the plaintiff alleged exceptions.

CHAPMAN, J. The question presented in this case is, whether a contract made between citizens of this state, upon good consideration, by which one of them agrees "not to set up, exercise or carry on the trade or business of manufacturing shoe cutters within the commonwealth of Massachusetts," is valid, or is to be regarded as void on the ground that it is contrary to the policy of the law.

The law has always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by a grant from the sovereign to a particular individual of the sole right to exercise a particular trade. This mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in Magna Charta. This clause does not, however, apply to grants for the sole use of a new invention for a limited period. These grants, it is said, are indulged for the encouragement of ingenuity. Patent right and copyright laws rest on this ground.

Another method by which monopolies were sought to be obtained was by private contracts, in which one of the parties agreed not to engage in some specified trade or business. In *Mitchel v. Reynolds*, 1 P. W. 181, which is usually cited as the leading case on this subject, corporations are specially mentioned as perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible. It was held in that case that a contract not to use a particular trade within the kingdom was void, on the ground that "it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some places, unless he intends a monopoly which is a crime." In subsequent cases the subject has been much discussed in the English courts. It is said that all restraints are presumed to be bad; but if the circumstances are set forth, that presumption may be excluded; and the courts are to judge of these circumstances, whether the contract be valid or not. The law, it is said, protects trade for the sake of the public, and not for the sake of the parties engaged in it. It is regarded as beneficial to the public that contracts for the partial restraint of trade should be upheld to a reasonable extent. A territory including the whole city of London, and several miles beyond, has been considered as reasonable; but it is not necessary that the restraint should extend to the whole kingdom to be void. Contracts for the exclusive use of a secret art are not within the principle, for the public has no right to the secret. Nor does it extend to a sale of the exclusive use of a trade protected by a patent. Some of the recent cases in which this subject has been discussed, and the earlier cases cited, are *Mallan v. May*, 11 M. & W. 653, *Price v. Green*, 16 M. & W. 346, and *Nicholls v. Stretton*, 10 Q. B. 346.

This court has adopted the English doctrines, so far as it has had

occasion to consider them. In *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119, it was held that a bond conditioned that the obligor shall never carry on or be engaged in the business of founding iron is void. But the restriction in that case was not limited to the commonwealth. In that respect it differs from the present case. On the other hand, it has been held that an agreement not to carry on a trade within a particular town or city is valid, and that such a restriction may extend to the whole of a particular stage route extending from Boston to Providence, or the navigation of the whole length of Connecticut river. *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Pierce v. Woodward*, 6 Pick. 206; *Gilman v. Dwight*, 13 Gray, 356, 74 Am. Dec. 634. It is also held that one may lawfully sell the right to carry on a secret trade, and bind himself not to carry it on nor to divulge the secret. *Vickery v. Welch*, 19 Pick. 523. So of the use of a machine protected by a patent. *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223. So of a business which is carried on out of the country. *Perkins v. Lyman*, 9 Mass. 522. In several of the states, contracts for the partial and limited restraint of trade have been upheld. In New York, it is held by the Court of Appeals that a restraint extending throughout the state is void. *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746. And the Supreme Court has held that a restraint extending through all the territory west of Albany is void. *Lawrence v. Kidder*, 10 Barb. 641.

The plaintiff contends that the trade in the present case was secret. But we cannot so regard it; for although it was not generally known to the public, it was carried on in three different towns in the commonwealth, by three different parties, who had no connection in business with the parties to this contract.

The plaintiff further contends that in this country a restraint ought not to be held void unless it extends throughout the United States, because they are one country in respect to trade and business, and the power to grant patents and copyrights and to regulate trade is vested in the United States government. But we cannot regard this view as just. A monopoly extending throughout the state may be as really injurious to the people of the state as if it extended throughout the whole country. Whether the principle extends to a case where, by means of travelling agents, one has extended his business through a large part of the country, or a large part of the state, and sells the good will of his business with a restriction merely coextensive with that good will, and not extending beyond the actual sphere of the business of the vendor, we need not discuss. The law regards the good will of a particular trade as property having a market value, and protects it to a reasonable extent, depending somewhat upon the nature and character of the business.

The plaintiff also contends that the restriction in this case is reasonable, because the territory of Massachusetts is comparatively small,

and the business is the manufacture of an article which is used only by manufacturers of shoes. But we do not think the extent of territory embraced in a state affects the principle. Whatever may be the extent of the state the monopoly restricts the citizen from pursuing his business, unless he transfers his residence and his allegiance to some other state or country. Its tendency is to drive business and citizens who are skilled in business from this to other states. If one is not at liberty to carry on his business here, but is at liberty to do so elsewhere, he will be likely to go elsewhere, and employ others to go with him.

The disposition to obtain monopolies which formerly prevailed is by no means extinct at the present day, nor is it confined to corporations. Combinations of men in business sometimes accomplish such an object, and they often succeed in obtaining exorbitant profits from the public.

In the present contract the court can see nothing beneficial to the public, and are of opinion that it is contrary to the well established policy of the law, and void.

Exceptions overruled.

MORSE TWIST DRILL & MACHINE CO. v. MORSE.

(Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 73, 4 Am. Rep. 513.)

CHAPMAN, C. J. As the case comes before us on demurrer to the plaintiff's bill in equity, the allegations of the bill must be taken to be true.

The plaintiffs seek to restrain the defendant from violating an agreement made between the parties June 22, 1864. The defendant covenants therein that he will convey to the plaintiffs two patents which have been issued to him for improvements made by him in "twist drills, and collets;" also his machinery and tools; also his rights of renewal and extension of the patents; his rights to letters patent for his machinery and invention for making drills and collets, or parts thereof, or for any portions of, or principles or combinations used in, such machinery or inventions. He warrants his title to the patents and the property sold, and agrees to make all necessary assignments and conveyances. He also agrees to transfer to them all improvements, new modes of manufacture, inventions and arrangements, relating to any of the premises and the general business of the company, that he may make or invent, and that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company; and he also covenants to do no act that may injure the company or its business, and that he will at no time aid, assist or encourage in any manner any competition against the same. He agrees to serve as the superintendent of the company for three years from July 1, 1864, perform such duties as shall be assigned to

him, and give his whole time and efforts for building up the business of the company.

In consideration of these covenants, the company covenants to pay him \$5,000 in thirty days; and \$5,000 more out of the net earnings and profits of the business after paying certain dividends; and \$1,500 per year for the term of three years, payable monthly.

The defendant had obtained his patents and commenced manufacturing the articles; but, being unable to carry on the business successfully, he induced certain persons to unite with him in forming the company and carrying on the business of manufacturing and selling the articles. They proceeded in the business, and this business was not intended to be, and was not, local in its character. They employed him for the three years, and agreed with him to continue in their service for another year. But in December, 1868, he resigned his office of superintendent; and though the plaintiffs continue to carry on their business and sell their twist drills and collets, the defendant has transferred his stock in their company, and entered into the manufacture of other twist drills and collets in Newark, New Jersey, which he sells in the same markets, in competition with them, at reduced prices, and to the same persons who dealt with the defendant as the plaintiffs' superintendent, and endeavors to supply the markets with these articles.

The defendant demurs, on the alleged ground that his covenants are in restraint of trade, contrary to public policy, and void, and that therefore he has a legal right to disregard them. The principle on which the defense rests has been much discussed, and, since the case of *Mitchel v. Reynolds*, 1 P. W. 181, it has been well established in England. It is also established in this commonwealth. See *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, and cases cited. The question now before us is, whether it extends to a case like the present.

It has never been extended to a business protected by a patent. Therefore, so far as any interference with the plaintiffs' patents is concerned, the covenants are not in restraint of trade. But it is not alleged that the defendant does infringe their patents; and thus the case does not rest on that ground.

Nor does it extend to a business which is a secret, and not known to the public; because the public has no rights in the secret. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664. All future inventions and improvements which the defendant might make would necessarily be of this character; for if they were not then secret, they would not be new inventions or improvements. Some of them might not be patented, yet the defendant bound himself to use them exclusively for the benefit of the plaintiffs.

The language of the contract implies that, when the plaintiffs joined the defendant in his new business, they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark, and that it was a material part of the consideration for which they paid him so

considerable a sum and invested their capital. It was not in restraint of trade, nor contrary to public policy, that the defendant should contract to render to the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated. And although the defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him.

In *Taylor v. Blanchard*, cases were suggested in which the restriction would be valid, if it did not extend beyond the limits of the good will of the business which was the subject of the sale, even if it covered the whole state. In some of the English cases, it had been said that the contract was valid unless it imposed some restriction beyond what the interest of the party required: *Tallis v. Tallis*, 1 E.L. & Bl. 391; *Mallan v. May*, 11 M. & W. 653, 667. But in these cases the restriction was local. In former times, almost every species of business that was carried on was of a local character; but there are some recent English cases in which the principle has been considered with reference to business which was not local.

In *Ainsworth v. Bentley*, 14 Weekly Rep. 630, the plaintiff had in 1851 purchased of the defendant "Bentley's Miscellany," which was then an established magazine. He took an agreement that the defendant would not publish another periodical of a like nature. In 1865, the defendant entered into an arrangement to become the publisher of "Temple Bar," a periodical of a like nature, and within the restriction. It was objected that that agreement was void, being in restraint of trade and unlimited, and that magazine publishing was a trade of itself. But Vice Chancellor Wood granted an injunction against violating the contract.

In *Stiff v. Cassell*, 2 Jur. (N. S.) 348, the defendant agreed with the plaintiff to write two tales for a periodical paper, and that he would not write for any other publication which should be sold for less than a certain price, for the space of a year. The restriction was held to be valid, though it had no limitation as to space.

In *Ingram v. Stiff*, 5 Jur. (N. S.) 947, a weekly periodical was sold, with an agreement by the vendor not to publish, either alone or in partnership, any other periodical of a nature similar to it. This agreement was held to be valid, and was enforced by injunction.

In these cases, the restriction, though extending through the whole kingdom, was obviously no greater than the interest of the vendee required; and, by giving it, the vendor had been able to obtain an enhanced price for what he sold.

In *Leather Cloth Co. v. Lorsche*, Law Rep. 9 Eq. 345, a company had been formed for the purpose of working a certain process of manufacture, introduced into Great Britain from America. They pur-

chased the right, with an agreement of the vendors that they would not, directly or indirectly, carry on, nor would they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions therein manufactured in the business or manufacture of the vendors, and would not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits agreed to be purchased. It was held that the restraint was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers; and it was enforced against the vendors. The decision acknowledges the principle that contracts are void, if their object is to deprive the state of the benefit of the labor, skill or talent of a citizen. But the court say that, on the other hand, public policy requires that when a man has, by skill or other means, obtained something that he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and, in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction is not unreasonable. He may not have any more restraint than is necessary for the benefit of the purchasers, but to that extent he may have it.

In this country, there are periodical publications that have a very wide circulation; and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value, unless he can obtain from the vendor a valid restriction against competition, which restriction shall be as extensive as his interest requires, though it may cover the whole of a state, or the whole country. The same would be true as to some books. For example, the author of a popular school book could not sell its proprietorship for its full value, unless he could bind himself not to prepare another book which should be used in competition with it.

The same would be true as to some manufactured articles. The present case furnishes an illustration. The defendant could not have obtained the consideration which was paid him, if it had been understood that this contract which he has violated had no validity. He is appropriating to himself a part of that which he has sold to the plaintiffs, and which is valuable property to them. It is unlike the cases where the prohibition extends beyond what the interests of the purchaser require, or is in any way unreasonable. The court are of opinion that the contract is valid.

Demurrer overruled.

DIAMOND MATCH CO. v. ROEBER.

(Court of Appeals of New York, 1887. 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.)

ANDREWS, J. Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred, August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant.

It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia"; and the complaint

alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in ten states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void.¹⁵

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. *Ward v. Byrne*, 5 Mees. & W. 548; *Mumford v. Gething*, 7 C. B. (N. S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial, and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the

¹⁵ Here the opinion reviews the earlier cases on unlimited covenants and considers such on principle.

whole of the state of New York constitutes a general restraint within the authorities. In *Chappel v. Brockway*, *supra* [21 Wend. 157], Bronson, J., in stating the general doctrine, as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested.

We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Steam Co. v. Winsor*, *supra* [20 Wall. 64, 22 L. Ed. 315], supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is of course competent for parties to a covenant to agree that a fixed sum shall be paid in case of

a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of nonperformance, and to be accepted by the covenantee in lieu of performance. *Insurance Co. v. Insurance Co.*, 87 N. Y. 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in *Long v. Bowring*, 33 Beav. 585, which was an action in equity for the specific performance of a covenant, with a claim for liquidated damages: "All that is settled by this claim is that if they bring an action for damages, the amount to be recovered is £1,000., neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of \$15,000, the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. *Insurance Co. v. Insurance Co.*, supra; *Long v. Bowring*, supra; *Howard v. Woodward*, 10 Jur. (N. S.) 1123; *Coles v. Sims*, 5 De Gex, M. & G. 1; *Avery v. Langford*, Kay, 663; *Whittaker v. Howe*, supra [3 Beav. 383]; *Hubbard v. Miller*, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed:

First. The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property right, and was assignable; at least, it was assignable in connection with a sale of the property and business of the assignees. *Hedge v. Lowe*, 47 Iowa, 137, and cases cited.¹⁶

We think there is no error disclosed by the record, and the judgment should therefore be affirmed. All concur, except PECKHAM, J., dissenting.

TODE v. GROSS.

(Court of Appeals of New York, 1891. 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475.)

Appeal by defendant from a judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment entered upon the decision of the court after a trial without a jury.

¹⁶ A part of the opinion relating to other questions is omitted.

Action for breach of covenant to recover the sum of \$5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatek." Such cheeses were made by a secret process known only to herself and her said agents.

On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good will, custom, trade-marks, and names used in and belonging to the said business," for the sum of \$25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatek,' and 'd'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof."

Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages,' etc., * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped

thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant"; also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," as well as that kept for sale by August Gross marked "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of \$5,000 as stipulated damages.

VANN, J. (after stating the facts).¹⁷ The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335; *Leslie v. Lorillard*, 110 N. Y. 519, 534, 18 N. E. Rep. 363; *Ther-*

¹⁷ A part of the statement of facts and a part of the opinion concerning another point are omitted.

mometer Co. v. Pool (Sup.) 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. *Bagley v. Peddie*, 16 N. Y. 469; *Dakin v. Williams*, 17 Wend. 448, affirmed 22 Wend. 201; *Wooster v. Kisch*, 26 Hun, 61.

As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except BROWN, J., not sitting.

GAMEWELL FIRE-ALARM TEL. CO. v. CRANE.

(Supreme Judicial Court of Massachusetts, 1893. 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458.)

Appeal from superior court, Suffolk county.

Bill by the Gamewell Fire-Alarm Telegraph Company against Moses G. Crane and Frederick W. Cole to enjoin defendant Crane from engaging in the manufacture and sale of fire alarm and police telegraph apparatus, in violation of his contract with plaintiff, and to enjoin defendant Cole from participating with Crane in the violation of said contract. Final decree was entered in plaintiff's favor as against defendant Crane, but the bill was dismissed as against Cole. Plaintiff and defendant Crane both appeal.

FIELD, C. J. The plaintiff company and the defendant Crane have each appealed from the decree of the superior court. The principal question is whether the following stipulation in the contract between the plaintiff and Crane is void. The stipulation is: "Said Crane further agrees not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881 he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for the term of ten years, and to give all its manufacturing to Moses G. Crane or Crane & Co., and they agreed not to compete with the Gamewell Company during that time." This is the contract which was annulled by the contract in suit.

By the contract in suit Crane sold and conveyed to the company all

his machinery, tools, draw cases, and other property used in or connected with his business of manufacturing for said company, including "stock supplies partly manufactured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under and control of all letters patent for fire alarm and police apparatus only, owned or controlled wholly or in part by him, together with exclusive rights under and control of all improvements in said fire alarm and police apparatus only, made by him up to the date of the contract, and he gave to said company the "first option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was \$30,000 in cash and notes, and such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was also to be paid for at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent if the company desired to hire it. The company actually paid Crane about \$47,000 as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly for the period of ten years," etc., is not void as being in restraint of trade—First, because it is an agreement pertaining to "property and business protected by patents;" secondly, because the restraint is coextensive only with the business sold, and is necessary to enable the company to enjoy fully what it has bought and paid for; and, thirdly, because it relates to a single commodity, not of prime necessity, and not a staple of commerce. See *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Machine Co. v. Morse*, 103 Mass. 73; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005. There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case.

The defendant contends that he has a right to assist in forming a corporation, and to act as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase, under the option given in the contract, even although by so doing he enters into competition with the plaintiff in its business. He, in effect, concedes that, so far as the business is

protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about 500.

The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the good will which attached to his business was that of a manufacturer who did not sell his manufactures in the market; and that it is against public policy that he should be restrained from exercising his peculiar skill anywhere in the United States or in the world for the period of ten years. The apparatus, as the defendant contends, which he has a right to manufacture and sell is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by patents at all, or by patents of his own, or of some other persons who may choose to employ the defendant.

The only ground, then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one where a contract in restraint of trade has been held valid, the restriction has been limited as to space. In *Taylor v. Blanchard*, 13 Allen, 370, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe cutters," and it was provided that "at whatever time the said copartnership shall be determined and ended" the defendant "shall not, nor will at any time or times hereafter, either alone or jointly with or as agent for any person or persons whomsoever, set up, exercise, or carry on the said trade or business of manufacturing and selling shoe cutters at any place within the aforesaid commonwealth of Massachusetts, and shall not, nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on" by the plaintiff. The manufacture of shoe cutters was an art, which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons; but the court held the agreement void.

In *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, the plaintiff, being engaged in the manufacturing and selling of bedquilts and comfortables, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortables," together with the good will of the business, and all the machinery, implements, and utensils used by him in said business, and agreed

"that for and during the period of five years from the date hereof he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space. See, also, *Alger v. Thacher*, 19 Pick. 51; *Pierce v. Fuller*, 8 Mass. 223, 226; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 43; *Palmer v. Stebbins*, 3 Pick. 188; *Gilman v. Dwight*, 13 Gray, 356; *Angier v. Webber*, 14 Allen, 211; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634.

The case of *Machine Co. v. Morse*, *ubi supra*, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company," and that he "will do no act that may injure the company or its business, and that he will at no time aid, assist, or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it. He was a stockholder, and was made superintendent. The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations, and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court say that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him."

The opinion proceeds to consider the English cases where the restriction was held not to extend beyond the good will of the business which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances. This doctrine, in England, has been carried very far. See *Davies v. Davies*, 36 Ch. Div. 359. In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern methods of doing business. See *Navigation Co. v. Winsor*, 20 Wall. 64; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658; *Ellerman v. Stockyards Co.* (N. J. Ch.) 23 Atl. 287;

Association v. Starkey, 84 Mich. 76, 47 N. W. 604; Matthews v. Associated Press (N. Y. App.) 32 N. E. 981; Oliver v. Gilmore, 52 Fed. 562; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419; Whitney v. Slayton, 40 Me. 224.

In the present case the plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets everything it bought if it gets the tangible property and the letters patent and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for ten years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents, in which case it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living. The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. Large cities and towns cannot well do without some kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities.

We are of the opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it. See *Factor Co. v. Adler* (Cal.) 27 Pac. 36; *Taylor v. Sourman*, 110 Pa. 3, 1 Atl. 40; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Herreshoff v. Boutineau* (R. I.) 19 Atl. 712; *Strait v. Harrow Co.* (Sup.) 18 N. Y. Supp. 224; *Anderson v. Jett* (Ky.) 12 S. W. 670; *Urmston v. Whitelegg*, 63 Law T. R. (N. S.) 455; *Perls v. Saalfeld*, [1892] 2 Ch. 149. For these reasons a majority of the court are of opinion that the decree against Crane should be substantially affirmed as to the assignment of patents and inventions and as to costs, and should be reversed as to the rest.

The decree in favor of Cole should be affirmed. So ordered.¹⁸

¹⁸ "The defendants have argued that, if Marshall had entered into a covenant never to engage in the business of manufacturing Marshall perfecting engines, it would have been void as a covenant in restraint of trade. But it is now settled that a covenant, even if it be unlimited both in time and space (*United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 358, 79 N. E. 790 [1907]), not to engage in a particular business is valid if it is coupled with the sale of a business and is necessary to give to the purchaser what he has bought (*Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403 [1898]; *United Shoe Machinery Co. v. Kimball*, 193

NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., Limited.

(House of Lords. [1894] App. Cas. 535.)

LORD HERSCHELL, L. C.¹⁹ My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms: "(2) The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from the restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as the other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company at a remuneration of £2,000, a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company,

Mass. 351, 79 N. E. 790 (1907)). The ground on which it is held that a covenant not to engage in a business similar to that sold is valid when expressed is the very ground on which a covenant not to engage in a similar business is sometimes implied from a sale of the good will of a business, namely, that it is necessary to give to the purchaser what is sold to him."

Per Loring, J., in *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 424, 89 N. E. 548 (1909).

¹⁹ The statement of facts and the opinions of Lords Watson, Ashbourne, Macnaghten, and Morris are omitted.

which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns & Ammunition Company by which the company was to purchase the good will of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns & Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3d of July, 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine on behalf of the new company, the Nordenfelt Company agreed they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3d of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of the 3d of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns & Ammunition Company, the good will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good will of the appellant's business, and was designed for the protection of the good will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the good will was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shewn, stated to the world to be the acquisition of the good will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wm. 181. That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or, secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, etc., with or without consideration, and whether it be of the party's own trade or not." In the case of *Master, etc., of Gunmakers v. Fell, Willes*, at page 388, Willes, C. J., said the general rule was "that all restraints of trade, (which the

law so much favours,) if nothing more appear, are bad. * * * But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of *Horner v. Graves*, 7 Bing. 735, Tindal, C. J., said: "The law upon this subject (i. e., restraint of trade) has been laid down with so much authority and precision by Parker, C. J., in giving the judgment of the Court of B. R. in the case of *Mitchel v. Reynolds*, which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'"

After stating that the case then before the court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, Parker, C. J., says: 'A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;' which are rather instances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of the judgment, understand this as an indication of opinion on the part of Tindal, C. J., that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by Parker, C. J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of Chief Justice Tindal's opinion by his judgment in the subsequent case of *Hinde v. Gray*, 1 Man. & G. 195. In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would

not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs, with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold, there was a demurrer to this breach; judgment was given for the defendant, Tindal, C. J., saying that it was "assigned on a covenant which according to the case of *Ward v. Byrne*, 5 M. & W. 584, was void in law." This is, to my mind, only intelligible if *Ward v. Byrne*, which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded as determining that the covenant in question in *Hinde v. Gray*, was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the court should not be regarded as governed by *Ward v. Byrne*; but Tindal, C. J., did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde v. Gray*, the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward v. Byrne*, except to say, although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these, only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to *Mitchel v. Reynolds*. He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This

exposition of the law has, further, the very weighty sanction of Willes and Keating, JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

In the year after the decision of *Hinde v. Gray*, the case of *Whittaker v. Howe*, 3 Beav. 383, 394, came before Lord Langdale. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel v. Reynolds* was cited in argument, but neither *Ward v. Byrne* nor *Hinde v. Gray* appear to have been brought to the notice of the Court. Lord Langdale expressed himself thus (*Whittaker v. Howe*): "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis v. Mason*, 5 T. R. 188, 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by Willes and Keating, JJ., as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde v. Gray*, should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather Cloth Company v.*

Lorsant, Law Rep. 9 Eq. 345, James, V. C., said: "I do not read the cases as having laid down the un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in *Rousillon v. Rousillon*, 14 Ch. D. 351, Fry, J., thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the case in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition was unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussions on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the cantee.

When Lord Macclesfield emphasized between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by."

He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: "Thirdly, because in a great many instances they can be of no

use to the obligee; which holds in all cases of general restraint throughout England; what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action. See Puffendorf, lib. 5, c. 2, § 3, 21 H. VII, 20." There are other passages in the judgment where this view is enforced.

There is no doubt that with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule required that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed at his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the good will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchasers. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the good will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good will were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner v. Graves*, 7 Bing. 735, 743, in considering whether the agreement was reasonable. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shewn, the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interests.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

TRENTON POTTERIES CO. v. OLYPHANT.

(Court of Errors and Appeals of New Jersey, 1899. 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612.)

MAGIE, C. J. The appeal in this cause is from a decree of the Court of Chancery, made upon the advice of Vice Chancellor Grey, dismissing appellant's bill of complaint, and denying the relief sought thereby. The pleadings in the cause, the issues presented, and the facts established by the proofs, are set out with such completeness in the opinion of the learned Vice Chancellor, and the statement preceding it, reported in 56 N. J. Eq. 680, 39 Atl. 923, that it is unnecessary to repeat them here.

The bill was filed by appellant against the seven defendants and respondents to restrain the breach of contracts alleged to have been made by them with it. It was dismissed as to all the respondents upon the ground that the contracts in question were in illegal restraint of trade, and against the public policy of the state.²⁰

It is next to be considered whether the decree can rest upon the ground that the contracts sought to be enforced are in illegal restraint of trade. The contract contained in the letter of January 23, 1891, and the covenant of June 6, 1892, are the obligations which the bill was filed to enforce. They are identical in terms, and purport to bind respondents to absolutely refrain from engaging in the business of manufacturing pottery ware "within any state in the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona for the period of fifty years." They are contracts in restraint of trade. This court, speaking by Chief Justice Beasley, more than 30 years ago, declared that contracts in general restraint of trade are illegal. *Brewer v. Marshall*, 19 N. J. Eq. 537. The learned Chief Justice found that to have been the undisputed rule of the English and of our own courts since the decision, in 1711, of *Mitchell v. Reynolds*, 1 P. Wms. 181. In that celebrated case Lord Macclesfield placed the illegality of such contracts upon the sole ground of their being inimical to the public interest or public policy. To the same origin the rule denying validity to such contracts was attributed by the Chief Justice in our leading case above cited. Our Court of Chancery has announced and applied the rule, and upon the same ground. *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37;

²⁰ A part of the opinion, considering whether certain individuals were bound by the contract, is omitted.

Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; *Althen v. Vreeland*, 36 Atl. 479.

In determining what is the public policy in this regard, we have, however, to take into account certain contracts which restrain trade. It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which, from the time of *Mitchell v. Reynolds* to this time, has been recognized as not inimical to, but permitted by, public policy. Therefore while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort, which have been sustained and enforced by courts, have been generally declared to be such as restrain trade—not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. This is the doctrine declared and applied in the Court of Chancery, and recognized in this court by our affirmance of its decrees. *Richardson v. Peacock*, 26 N. J. Eq. 40; *Id.*, 28 N. J. Eq. 151; *Id.*, 33 N. J. Eq. 597; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. 654; *Id.*, 44 N. J. Eq. 604, 17 Atl. 1104; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348.

It is observable that of late, and elsewhere, it has been questioned whether the rule as thus stated is not too broad to be applicable to present conditions. In 1711 trade was subject to limitations which have largely diminished or ceased to exist. When orders and responses had to be transmitted by mail or messenger, and the mail and travelers were carried by coaches drawn by horses, and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by those conditions. Now that orders and responses may be transmitted for long distances by telephone, and over the world by telegraph, and goods and travelers may have quick transit over land and sea, the area of such trade may be immensely greater. Thereupon it is contended with great force that the true test of the validity of such contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and that, considering the vast extent of the area of

some trades, there are cases in which a general restraint cannot be held to be unreasonable. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Nordenfelt v. Ammunition Co.*, [1894] App. Cas. 535; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; *Machine Co. v. Morse*, 103 Mass. 73; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *Underwood v. Barker*, [1899] 1 Ch. 300.

The question thus suggested does not arise in this case, unless the contracts before us are found to be contracts in general restraint of trade. This leads us to inquire whether they are general, or only partial, in their restraint, and, if the latter, whether they extend beyond what is reasonable for a fair protection of the business and good will which appellant purchased from respondents.

The contention on the part of respondents is that the contracts in question restrain them from engaging in the business of manufacturing pottery ware in an area comprising the whole United States, and that the exception of one state and one territory was illusory and colorable, because they claim the proofs show that such manufacture cannot be carried on in those localities with profit. It is insisted that a restraint extending over the whole nation is a general and not a partial, restraint. It was well said by Judge Andrews in his opinion in *Match Co. v. Roeber*, *ubi supra*, that "the boundaries of the states are not those of trade or commerce." It may also be said that in these days the business of many a concern extends, not only beyond the boundaries of the state in which it has a local habitation, but even beyond the limits of the nation. Yet the public policy of that state may be involved in favor of or against the restraint of such trade, however widely extended. It is possible to conceive of a business so widely extended that a restraint of it within the limit of one country might be in fact but a partial restraint. In the case last cited an exception of one state and territory similar to that contained in the contracts in question was pronounced not colorable, but the case does not indicate that the exception was shown by the proofs to be of territory in which the restrained manufacture could not be carried on with practical results.

In this case the proofs establish that to be the fact as to the area included in exception. It is contended for appellant, however, that the fact so established is immaterial, because the rule against general restraint of trade is an arbitrary one, and an exception from the restraint, however unsubstantial or illusory, will make the restraint partial. It is not easy to perceive how a rule of this character, founded on considerations of public policy, and applied in the public interest, can be rightly deemed arbitrary in the sense intended in this contention. Nor is it obvious that the courts would permit the evasion of the rule by illusive contrivances. But the question presented need not be decided, unless the contracts, properly construed, extend the restraint of respondents over the whole area of the United States, except the excepted parts. If by the true construction the contracts are divisible,

and bind respondents to a restraint in one or another of separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable, the suggested question need not be solved. The area or areas within which the restraint upon respondents is engaged for in these contracts is described as being not, as stated in the opinion below, within any state "of" the United States of America, but within any state "in" the United States of America. In seeking the meaning of this description, we are to be guided by the ordinary rules of construction. We may presume that the contracting parties intended to make a valid contract in this case, under the doctrine enunciated in *Brewer v. Marshall*, that they designed to contract for a restraint which would be partial, and not general, and reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase. The contracts are to be construed so as to give them validity, if such construction does no violence to their language; and the subject-matter of the contracts is to be considered, and their terms are to be construed, in reference thereto.

Here the transaction was the sale and purchase of an established business, with its good will, and the contracts in question were plainly intended to furnish protection to the purchaser in the enjoyment of the things purchased. Respondents received a large sum of money for what they sold appellant, which they yet retain, and it is clear that the consideration thus received and retained must have been enhanced in amount by the obligation of the contracts now in question, and that so much could not have been obtained by respondents if no obligation to restrict competition had been made. Examining thus the description of the area within which the restraint agreed to by respondents is to operate, I have reached the conclusion that, without doing any violence to the language, or straining its import, it may be and ought to be held to be a divisible description, embracing, not one whole area, but several areas disjunctively described. The exception of the territory of Arizona is urged as inconsistent with this construction. But the express inclusion of the District of Columbia equally militates against the contrary construction, for, if the description covers the whole area of the United States of America, the District of Columbia was already included. Looking at the subject of the contracts, their presumed intent, and the purpose of any agreement to restrain respondents from engaging in a competitive business, the description can be read as applicable disjunctively to different areas—as within the state of Maine, within the state of New Hampshire, or within the state of New Jersey, etc., or within the District of Columbia, excepting, etc., and such should be its construction. Thus read, the contracts in question are applicable to all the described areas, and are enforceable in those of them within which the restraint contracted for is reasonably required for the protection of appellant in the use and enjoyment of the business and good will acquired from respondents.

An instructive case on this point has lately been decided in Eng-

land. The question arose upon a covenant by an employé with his employer that within 12 months after leaving his employment he would not engage in a similar business "in the United Kingdom or in France, or in the kingdom of Belgium or Holland, or in the dominion of Canada." The employé voluntarily left the service of his employer, and entered into the employment of a merchant in the same trade in England. Upon a bill by the first employer, Kekewich, J., allowed an injunction against the breach of the covenant. Upon appeal the cause was heard in the Chancery Division, before Lindley, M. R., and Rigby and Vaughan Williams, L. JJ. The Master of the Rolls and Rigby, L. J., held that the covenant was a separable one, and was not unreasonable, as to the restraint imposed on the covenantor within the United Kingdom, and they sustained the injunction. Vaughan Williams dissented, but upon the ground that the restraint within the whole of the United Kingdom was unreasonable. *Underwood v. Barker*, *ubi supra*.

It is next to be considered whether the contracts in question, thus construed, were reasonably required for the protection of appellant, and to what extent, if any, they should be enforced, under the proofs in the cause. It appears by the proofs that the business which appellant purchased of respondents had been carried on by them within an area, roughly speaking, covering the states east of the Mississippi river, and north of a line drawn through Richmond and Louisville, including the District of Columbia. Appellant contends that such contracts were reasonably required to protect it, not only in the areas in which the business it purchased of respondents had been carried on, but also in other states to which it might extend that business. But this contention I deem to be inadmissible. The validity in this respect of such contracts is to be tested by the effect upon the business and good will sold and purchased. What is reasonably required to protect that may be upheld. But the vendor can no more contract to restrict his use of his trade or calling beyond such protection than he could do if he had made no sale at all. Such a contract would be opposed to public policy.

But while it results from this view that the contracts in question, so far as they restrain respondents from engaging in the same business in localities in which the business purchased by appellant of them had never been carried on, may be opposed to public policy, it does not follow that they are wholly unenforceable. Contracts including distinct and separable obligations, some of which are legal, and some prohibited, are enforceable as to such obligations as are legal. *Union Locomotive & Exp. Co. v. Erie Ry. Co.*, 35 N. J. Law, 240; *Stewart v. Railroad Co.*, 38 N. J. Law, 505. These contracts, as to areas described therein in which the acquired business had been carried on, may be enforced upon proper proofs. Upon the proofs, how far may these contracts be enforced? The prayer of the bill is for an injunction in the terms of the contracts. But this would be too broad a re-

straint on respondents, because it would include localities in which the purchased business had never been carried on, and where no protection of it was required. Upon the proofs, I conclude that no restriction can be imposed upon respondents as to any area beyond the state of New Jersey. In this state all the respondents, except Richard C. and Henry D. Olyphant, are actively engaged in the very business they contracted not to engage in. There is some proof of sales and solicitation of trade in other prohibited areas, but it lacks the requisite certainty to justify a broader injunction.

It remains to consider other objections to the reasonableness of these contracts. It is contended that they are unreasonable because they restrain respondents from the manufacture of any pottery ware, while the business sold is claimed to have been that of manufacturing sanitary pottery ware. But the plant respondents sold was adapted to the manufacture of other kinds of ware, and they had in fact manufactured other ware. The business purchased was not the mere manufacture of sanitary pottery ware, and the contracts were not too broad, in furnishing appellant protection in respect to the manufacture of all pottery ware.

It is further objected that the contracts in question extend the restraint upon respondents over too great a period of time. The ages of respondents, it is said, show that at the expiration of the limit of 50 years probably some of them will have died, and all of those surviving will have passed the age of business activity. The contracts are not unlimited in time, but the insistence is that they are unreasonable because of the long limit of restraint. But whether they are reasonable is not to be determined by their disadvantageous effect upon respondents, but by considering whether the restraint to which, for what they received as a sufficient consideration, they bound themselves, was reasonably required to protect the purchaser in the enjoyment of his purchase. As they were dealing with a corporation which had acquired a corporate life of 50 years for the purpose of carrying on this business, the limit of time fixed by the contracts is not unreasonable. The fact that the limit exceeds the corporate life of appellant by a few days does not, in my judgment, require a different conclusion.²¹

HALL MFG. CO. v. WESTERN STEEL & IRON WORKS.

(Circuit Court of Appeals of the United States, 1915. 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620.)

BAKER, Circuit Judge. This appeal is from a decree dismissing appellant's bill on final hearing.

Facts, counted on in the bill and established by the proofs, may be summarized as follows:

²¹ The remainder of this opinion is printed post, p. —.

Appellant, an Iowa corporation, located at Monticello, was engaged in making wire stretchers, hoisting blocks, stake irons, weed pullers, and similar farm appliances, and in selling them generally wherever there was a demand.

Appellee, Western Steel & Iron Works, a Wisconsin corporation, located at De Pere, was engaged in making farm gates, trowels, spades, etc. It was organized in 1905. Prior to November 26, 1910, it also made and sold post hole augers and diggers—diggers since 1905 and augers since the beginning of 1909.

During the summer and fall of 1910 appellee was financially embarrassed, its property was under mortgage, and it was in pressing need of ready money. It solicited appellant to buy its digger and auger business, which amounted to about half of its total business. Officers of appellee visited Monticello, officers of appellant examined the property at De Pere, and meetings were had at Milwaukee. On November 26, 1910, appellee sold and conveyed to appellant everything pertaining to the digger and auger business, machinery, tools, dies, finished and unfinished stock, orders, patents, and "the good will of the business." Collateral to the sale of the good will appellee covenanted "to render such assistance as it reasonably can in introducing it (appellant) to the trade and in forwarding to it any orders it may receive for augers and diggers after December 10, 1910," and "not again to go into the manufacture of the post hole augers and diggers."

At the time of the sale, when appellee's business in diggers was five years old and in augers two, it had marketed these articles in thirty-four of the United States and in two Canadian provinces. In considerable regions these articles cannot be used. Appellee's sales were entirely to jobbing houses. In addition to seed that had already brought forth fruit, appellee through advertisements, commission men, and the outstretched hands of jobbers had sown other seed, so that we may take the fact to be in accordance with the admitted representation of appellee's treasurer that appellee was trying to sell wherever there was a demand and that by reasonable attention the trade could be expected to extend "throughout all parts of the United States and Canada where augers and diggers can be used." So it is evident that appellee was selling and was covenanting to protect a national and international good will.

Appellant paid the agreed price, \$13,500, less deductions, provided for in the contract, of about \$3,000 for appellee's failure to turn over the stipulated amount of orders. The evidence in the record warrants the conclusion that appellee under the contract obtained about double the fair selling value of its worn machinery, tools, etc., and that appellant would not have purchased the physical property apart from the good will of the business and appellee's protective covenants.

This purchase was made by appellant because diggers and augers would fit in well with the lines of farm appliances it was already making and selling. Neither before nor afterwards was appellant a

party to any combination or agreement for fixing prices or restraining competition. And consumers have been able to purchase diggers and augers at prices as low as formerly, under competition of the same number of independent manufacturers doing business throughout the country.

Appellant began promptly to manufacture and market the same seven styles that appellee had been supplying to the trade, and under the same seven names, which, except as to "Ideal" and "Western," for which patents were assigned to appellant, had become generic names of styles on which patents had expired.

Within a month or so appellee, with its mortgage discharged and its financial embarrassment relieved, began to manufacture all its former open styles under the old names, and to sell them wherever it could. When appellant learned of this conduct, some six months later, it protested; and, its protest being defied, this suit was begun.

Appellee Jenny was made a defendant under allegations that patents owned by appellee company stood in his name and had not been assigned as provided for in the contract. These averments are not sustained, and the decree as to Jenny will be affirmed.

Appellee in its answer justified its conduct under an alleged rescission. But as the proofs showed that appellee was holding onto the purchase price and had made no offer to restore the status, the contract must be considered alive.

Another avoidance of the necessity of facing its conduct was based on Wisconsin statutes and decisions. Section 1770b relates to foreign corporations doing business in the state. Section 1791j is under the title "Trusts, Pools, and Conspiracies." Section 1747e is part of the treatment of "Trusts and Monopolies." Cited decisions are said to prove Wisconsin's rejection of contracts in total restraint of trade. We attempt no analysis, because we assume that Wisconsin has not undertaken to regulate interstate commerce. Every part of this transaction was in interstate commerce. Even the Wisconsin trade, which had been intrastate as to appellee, was intended by the parties to be and it became interstate when conveyed to appellant. The validity of a contract in interstate commerce must be determined by the general law. If any statute applies, it must be federal. And so long as Wisconsin permits her corporations to reach out beyond the state borders and do business with citizens of other states, such corporations must be treated in regard to interstate commerce the same as any citizen of the United States.

Is appellant remediless? The trial court so decided because the protective covenants are without limitation of either time or place.

In the first reported case, that of John Dier, decided in 1415, Year Book 2 Hen. V, 5, covenants were held to be unenforceable, no matter how limited in time and place. Hull, J., said:

"In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law;

and (per Dieu) if the plaintiff were here he should go to prison till he paid a fine to the king."

During the generations when an artisan had to pass through apprenticeship into a guild, when he was tied to his trade and place by statutes forbidding him to leave his parish under pain of pillory or prison, when if he could not stand where he was rooted he would become a public charge, it may have been right enough for the king's courts to see no public interest but the artisan's ability to pay taxes and serve the king. If, however, fifteenth century doctrines of absolutism were to govern in twentieth century conditions of democracy, a victim of a covenantor's perfidy might well prefer to settle his legal rights by the fifteenth century wager of battle. But the glory of the common law is its inherent power of growth, its adaptability to new and enlarged conditions of life, its responsiveness to higher standards of social and business ethics. And so during the centuries naturally there were developments and departures with respect to this ancient doctrine. It took the courts a long time to get beyond testing the validity of a restrictive covenant purely by the presence or absence of limitations. If a restraint was unlimited as to both time and place, or was unlimited as to place though not as to time, it was unenforceable; if limited as to both time and place, or if limited as to place, though not as to time, it was valid.

But, beginning about 1830, the advent of the factory system, multifold new machines, railroads, steamships, fast mail and express service, telegraphs, telephones, wireless, trolleys, automobiles, aeroplanes, lessening space, shortening time, offering continually new and widening avenues for both labor and capital, emphasized a point of view that had been suggested in somewhat earlier times; and that is that the validity of a restrictive covenant should be tested by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will.²²

Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Logically the corollary follows that by the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time and place. A restraint of 500 miles and 50 years on a village doctor, who had only a local practice, would be unreasonable, because not reasonably necessary to the protection of his successor, while a general covenant by Pears Soap Company should be enforced (at least to the extent of the decreeing court's reach) because the good will of the business is world-wide and of expected indefinite continuance.

In *Prame v. Ferrell*, *supra* [166 Fed. 702, 92 C. C. A. 374], a general covenant was enforced. The court construed the covenant "as limiting the restraint to the United States." In the present case the trial

²² An extended list of cases, cited to show the development of the rule in question, is omitted.

court accepted counsel's criticism that our brethren of the Sixth circuit were violating the rule that courts cannot lawfully remake the contract of the parties. But in our judgment the same result of enforceability is reached by taking the covenant as written, without limitation of time or place. For the covenant is neither immoral nor criminal. It stands, unless it must be overthrown on account of the covenantor's objection. His objection is based wholly on our domestic public policy. Our domestic public policy has no extraterritorial force. And therefore the limitation of the decree, if so made, comes from the inherent limitation of the covenantor's objection, not from constructively limiting his unlimited covenant.

In this case, and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenants; Honesty and fidelity among our business men; and the interest of every one, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced. Here, of course, honesty condemns the conduct of appellee. Freedom of alienation is a byword, if appellee may sell property, retain the proceeds, and then repossess itself of the property with impunity. And what injury to the public was done that preponderates over honesty and freedom of alienation in the other scale? Appellee is a corporation. If any stockholder or officer is skilled in any profession or art, he is not restrained from exercising his skill by the corporation's covenant. Even the capital that was at hazard in the digger and auger branch of appellee's factory may be reinvested in the same business by the stockholders individually or collectively outside of appellee corporation. Appellee itself, rescued from financial embarrassment, and with its remaining business made sound by the use of appellant's money has been benefited. Consumers in Wisconsin and everywhere in our country get as fair prices as before, under competition of the same number of independent manufacturers. In our judgment there is no injury to the public, and the scale containing honesty and freedom of alienation strikes bottom. Inasmuch as the collateral covenants are no broader than the conveyed good will, full-grown and embryonic, they should be enforced.

But, apart from the covenants, we think appellant is not remediless. If the covenants were considered void, that would not vitiate the contract in other respects, since there is nothing immoral or criminal in making such covenants. They are merely unenforceable civilly at the worst. *Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co.* (C. C.) 11 Fed. 1; *Western Union Tel. Co. v. Kansas Pacific Ry. Co.* (D. C.) 4 Fed. 284; *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975; *Dean v. Emerson*, 102 Mass. 480; *Peltz v. Eichele*, 62 Mo. 171; *Fishell v. Gray*, 60 N. J. Law, 5, 37 Atl. 606; *Rosenbaum v. U. S. Credit System Co.*, 65

N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; *Union Locomotive & Express Co. v. Erie Ry. Co.*, 35 N. J. Law, 240; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Mallan v. May*, supra [11 M. & W. 653]; *Price v. Green*, supra [16 M. & W. 346]; *Cheesman v. Nainby*, 2 Lord Raym. 1456; *Dubowski & Sons v. Goldstein*, supra [1 Q. B. 478]; *Rogers v. Maddocks* [1892] 3 Ch. 346.

If one should sell a chattel, and then retake it by stealth or force or fraud, both the criminal and the civil law would lay hold. Because the retaking of a conveyed good will has not yet been included in the penal code is no reason, in our judgment, why equity should hesitate to arrest the trespass.

As to appellee Jenny the decree is affirmed; as to appellee corporation the decree is reversed, and the cause remanded for proceedings in consonance with this opinion.

WYDER v. MILHOMME.

(Court of Errors and Appeals of New Jersey, 1921. 115 Atl. 380.)

PARKER, J. The suit is brought upon a covenant in restraint of trade, and the trial judge directed a verdict for the defendant upon two grounds: First, that the clause fixing the agreed damages for violation at \$50,000 created a penalty, and not liquidated damages;²³ and, secondly, that the restraint imposed was illegal as against public policy. The plaintiffs appeal, and the substantial question argued is whether the direction was proper.

The covenant reads as follows:

"The said Felix Milhomme agrees that he will not, during the period of 10 years from April 15, 1913, enter into the same or a similar kind of business as that now carried on and conducted by the Silk Finishing Company of America, and that he will not be connected in any manner or form, directly or indirectly, as a stockholder or otherwise, with any other firm, corporation or business engaged in the same or a similar kind of business in the United States of America, for the said period of ten years; that he will not disclose, for the purpose of harming or injuring or doing damage to the Silk Finishing Company of America to any person, firm or corporation, anything pertaining to the business of the Silk Finishing Company of America, and he further agrees that he will not knowingly, during said period of time, aid, assist or advise in any way whatsoever, any business, individual, firm or corporation engaged in the same or a similar line of business, or any business, firm or corporation that may desire to become interested in or to engage in the same or a similar kind of business.

"The above provisions of this paragraph to apply equally to any

²³ So much of the opinion as relates to this ground is omitted and the opinion otherwise slightly abridged.

business, firm or corporation which may engage or desire to engage in such business for itself alone or for others."

It is argued, and with much weight, that this covenant is in four parts, the first, third, and fourth unrestricted as to territory, and the second restricted only to the United States of America. But viewing the restriction to the United States as applicable to all four clauses in the covenant, we are of opinion that it is in violation of the rule that restrictions of this character must be reasonable as to time and space. It is claimed for appellant that the silk finishing business is confined to a somewhat restricted territory, surrounding New York City. This, as we view it, is an important reason for holding that a restriction covering the entire nation is unreasonable as to space. Non constat that a silk finishing industry might not be desirable and profitable in or near Chicago or St. Louis, for example.

In *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, and *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. Law, 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913, both decisions of this court, there was full recognition of the rule that a contract in partial restraint of trade is not objectionable to public policy unless it goes further than is reasonably required for the protection and enjoyment of the business in whose interest it is made, or unless the restraint is so great as to interfere with the interests of the public. In both of those cases the contracts examined were upheld, not because the territory mentioned, taken in its full extent, was not unreasonably large, for the plain implication in each case, if not the explicit declaration, was that, if applied to all the territory, the contract could not stand; but in both cases the court adopted a rule of selective construction of the contract, whereby it was enabled to confine the operation of the contract to a territory deemed reasonable; in the one case the state of New Jersey, in the other the city of Jersey City. The present covenant admits of no such construction, for where it mentions any territory at all it speaks of "the United States of America," without any hint of a subdivision thereof. Consequently there is no room for such a construction as was adopted in the cited cases.

We are not unmindful of the recent relaxations, or apparent relaxations, in the rule emanating from courts of high authority, as, for example, the famous *Maxim Nordenfelt Case*, 1894, A. C. 535, 6 E. R. C. 413, where a world-wide restriction was supported. Such cases indicate the rule that the restriction may be reasonably adequate to protect the business of the covenantee, so long as it does not infringe on the interest of the public. The covenant now under examination seems objectionable in both aspects. It forbids defendant from engaging in a business for which he is fitted by training and experience, anywhere in a territory many times larger than the actual or reasonably expected field of operations of the covenantee; and to the same extent deprives the public of his usefulness in the capacity in question.

It is argued that the question of unreasonable restriction was held by this court in the Fleckenstein Case to be for the jury. What we said was (76 N. J. Law, at p. 616, 71 Atl. 267 [24 L. R. A. (N. S.) 913]):

"If a contract having the scope suggested does not impose an unreasonable restraint upon trade, it would seem that the question whether the area which was embraced in a given contract was greater than was required for the full protection of the vendee must ordinarily be one of fact to be determined by the jury."

But in that case we also said the question of unreasonable restraint of trade need not be determined, because of the selective construction restricting the operation of the covenant to Jersey City; and, as we have already said, no such construction is possible here. The covenant plainly imposes an unreasonable restraint on trade, and hence the case is not within the scope of the suggestion above quoted, which as we said at the time, was outside of the case. We conclude that the unreasonable character of the covenant was in this case a court question on both branches, viz. protection of the vendee, and protection of the public, and was correctly decided below.

The judgment is affirmed.

McCLURG'S APPEAL.

(Supreme Court of Pennsylvania, 1868. 58 Pa. 51.)

Appeal from the decree of the court of common pleas of Chester county; in equity.

Dr. Benjamin Thompson filed a bill against Dr. John R. McClurg, averring as follows: That the defendant, being a practicing physician a Chandlerville, Chester county, agreed, on the 22d of January, 1859, with the plaintiff to sell him his office fixtures and furniture, etc., with his good will in his profession, for \$125, and bound himself to remove not less than twelve miles from the place, and never thereafter to establish himself as a physician within twelve miles without the plaintiff's consent, to use his influence to throw his practice to the benefit of the plaintiff, and give countenance to no other in that direction; averring further that the defendant had established himself as a physician within five miles of his former location without the plaintiff's consent. The bill prayed that he might be restrained from practice in his present location, and from establishing himself elsewhere within the prescribed limits.

The answer alleged that the fixtures, etc., were worth at least \$300; that the agreement as written did not contain the whole agreement of the parties; that the restraint was to have application only so long as the plaintiff should remain on the property then occupied by the defendant, that the plaintiff had ceased to occupy that property, and the defendant had not interfered and did not intend to interfere with the plaintiff's practice.

The case was referred to Joseph Hemphill, Esq., as examiner and master.²⁴

The master reported that the evidence sustained the allegations of the bill, and that there was no evidence offered of fraud or mistake in drawing the agreement, and reported in conclusion:

"Upon the whole, neither fraud or mistake having been established, the subscriber is of opinion that the plaintiff having proven his bill, and the defendant failed to establish any effective answer thereto, the law and equity of the case gives to the plaintiff the right to the injunction prayed for and costs of suit."

Exceptions were filed by the defendant to the report which was confirmed, and the court (Butler, P. J.) decreed that "an injunction be issued, restraining the defendant from establishing himself in the practice of his profession of medicine, within the limits of twelve miles from the location on the 22d day of January, 1859, or remaining, as at present established within said limits, and from practicing his said profession within the circle of his practice at the date aforesaid."

The defendant appealed, and assigned the decree for error.

The opinion of the court was delivered January 28, 1868, by

SHARSWOOD, J. That contracts restraining the exercise of a trade or profession in particular localities are valid, when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good will of a trade or business when the vendor covenants not to pursue the same business within certain prescribed limits, is beyond question. The leading case is *Mitchel v. Reynolds*, 1 P. Wms. 181, in which Parker, C. J., delivered a long and elaborate opinion. The doctrine has been at rest ever since, as Lord Kenyon declared in *Davis v. Mason*, 5 T. R. 118, in which a bond by a surgeon not to practice within ten miles of the place where the obligee lived was held good, and a similar undertaking by an apothecary, not to set up his business within twenty miles, was sustained in *Hayward v. Young*, 2 Chitty, 407. The appellee had therefore a clear legal right under his contract. Ought a court of equity to enforce it by injunction?

When Mr. Eden wrote his valuable treatise on the law of injunction he stated that he had not been able to find any reported cases in which the court had interfered by that process to restrain the breach of such a covenant. He admits, however, that it may be inferred from Lord Eldon's observations in *Crutwell v. Lye*, 17 Ves. 335, that there is no reasonable objection to the exercise of such a jurisdiction. Eden on Injunctions 223, 224. In that case, however, there was no contract, but merely the sale of a trade, with the good will, which without express covenant, or fraud, was held not to prevent the vendor from setting up the same business. Lord Eldon said, "a man might stand by and give encouragement generating a confidence that he would not engage in such a trade, inducing other persons to involve themselves;

²⁴ The recital of the evidence is omitted.

on the ground of which conduct this court might interpose." If equity would enforce an implied contract within reasonable limits, a fortiori they ought to interfere in the case of an express one. Accordingly several subsequent decisions both in England and America have acted on this principle. *Harrison v. Gardner*, 2 Madd. Ch. Rep. 198, was the case of a retiring partner, who, according to the statement of the bill, had given an assurance verbally that he would not set up in the same line of business in the street in which it had been carried on before, or its immediate vicinity. The Vice Chancellor, Sir Thomas Plumer, said, "Suppose there was no dispute as to the facts stated in the bill, but that they were admitted, it is clear the court would relieve." In *Williams v. Williams*, 2 Swanst. 253, Lord Eldon granted an injunction in a similar case of a retiring partner where, however, there was an express agreement in writing. *Butler v. Bursleson*, 16 Vt. 176, was like this, a contract between two practicing physicians, and it was enforced by injunction. "When there is an express covenant," said C. J. Williams, "and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it cannot be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day, and furthermore, the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. It seems, therefore, to be a very proper case for a court of chancery to enforce the contract by granting an injunction to prevent the breach of it, according to the acknowledged principle on which courts of equity act in similar cases." The same doctrine was maintained in *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380. Judge King also recognized it as established in *Palmer v. Graham*, 1 Pars. 476, and awarded an injunction on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith.

We see nothing to distinguish this from the cases cited. It has been objected that the consideration was inadequate. Upon that subject *Tindal, C. J.*, delivering the opinion of the Court of Exchequer Chamber, in *Hitchcock v. Coker*, 6 Ad. & Ellis, 438, said: "If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained or a mere voluntary contract, nudum pactum, and therefore void. But if by adequacy of consideration, more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether in any particular case, the party

restrained has made an improvident bargain or not." This is not like a bill for the specific performance of an unexecuted contract, where, if the bargain is a hard one, or founded on an inadequate consideration, a chancellor will refuse to interfere, but leave the party to his legal remedy. This agreement was fully executed. The appellant removed, and the appellee on the faith of it gave up his practice at the place where he was before established, and settled in the new neighborhood. He cannot be put in statu quo. We cannot by our decree restore to him the practice he has given up, nor could any damages a jury would give be an adequate compensation. Even if it should be a sum which would purchase a life annuity equal to his former income, that would not provide for that increase from year to year which enlarged experience and widening reputation would, in all probability, have insured to him had he remained where he was. The appellant has returned and established himself within the prescribed limits in violation of his agreement. It was said that he did not mean to interfere with the appellant's practice; but how can he well avoid it if he is called upon by his old patients and others? It was with a view to this that the contract stipulated that he should not establish himself in the practice of his profession within twelve miles. This distance was doubtless named because it was considered sufficient to render the practice in the appellant's old circle, reaching a distance of five or six miles on either side, secure to the appellee. We agree with the court below that such a restraint is not unreasonable, nor greater than the appellee's protection may require.

Decree affirmed at the costs of the appellant.

THOMPSON, C. J., dissented, not on the ground of want of power in the court, but because not a case in which specific performance should be decreed, but the party left to his action at law.

RAKESTRAW v. LANIER.

(Supreme Court of Georgia, 1898. 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154.)

On August 10, 1895, Lanier and Rakestraw, physicians residing in the town of Oliver, formed a partnership for the practice of medicine, surgery, and obstetrics. The articles of copartnership contained, among other stipulations, the following: "In consideration of the advantages and benefits that will flow to said Rakestraw by reason of the formation of said firm and partnership business, he hereby agrees that in the event said firm shall at any time hereafter be dissolved, that he will not locate or engage in the practice of medicine, surgery, or obstetrics at said town of Oliver, or at any place within fifteen miles radius from the drug store of said Lanier, unless he shall first have obtained the written consent of said Lanier. And, in the event the said Rakestraw shall violate the terms of this article, the said Lanier shall

be entitled to sue and recover, as his damages, the sum of one thousand dollars annually from said Rakestraw so long as he shall violate the terms of this article; said sum of \$1,000 being agreed now between the parties hereto as damages, and not as a penalty. This partnership shall continue for the space and term of twelve months from the date when signed by the parties hereto, unless sooner dissolved. This partnership may be dissolved by either member giving to the other, in writing, a notice of his intention to withdraw from the partnership; and, at the expiration of thirty days from the service of such notice by either member on the other, said firm shall be dissolved."

On June 3, 1896, Lanier wrote to Rakestraw [giving the requested notice of dissolution of the partnership]. The partnership was accordingly dissolved. After the dissolution, Rakestraw continued to reside in the town of Oliver, and to practice medicine, surgery, and obstetrics therein, and within the radius of 15 miles referred to in the contract. On September 18, 1897, Lanier wrote to Rakestraw, at Oliver, as follows: "Under our contract, you are now due me \$1,000, which you will pay at once, or discontinue practice in this place." Rakestraw refused to comply with this demand; and on October 26, 1897, Lanier brought to the superior court his petition, setting out the foregoing facts, and alleging that Rakestraw was still engaged in the practice of medicine, surgery, and obstetrics in the locality mentioned, contrary to his contract, in violation of equity and good conscience, and in fraud and damage of petitioner; that by reason of this breach of the contract, and under the express terms thereof, defendant became indebted to him in the sum of \$1,000 at the expiration of the year from the date of the dissolution, and is still so indebted; that defendant is hopelessly insolvent; that petitioner has no adequate remedy at law; and that the injury complained of is continuing in its nature, and will necessitate a suit at the expiration of each year, and by reason of the bad faith of the defendant, and the nature of petitioner's business, his age, and his circumstances, the injury is irreparable in damages. Waiving discovery, he prayed a judgment against defendant for \$1,000, a perpetual injunction, and, until the final hearing, a temporary injunction, restraining the defendant from engaging in the practice of medicine, surgery, or obstetrics at the town of Oliver, or any place within a radius of fifteen miles from the drug store of petitioner, unless he shall have first obtained the written consent of petitioner.

The defendant demurred and answered, and, at the hearing of the application for temporary injunction, urged that the petition set forth no ground for injunction or other relief against him; that the stipulation in the contract upon which the petition was based is against public policy and illegal, and is not valid or enforceable against the defendant; that it is not a reasonable or proper stipulation, within the meaning of the requirements of the law, and is unjust, unfair, and against good conscience; that it is without sufficient consideration to support it, and is lacking in mutuality, and does not put the plaintiff under such

obligation as would make the agreement of the defendant valid and binding; and, further, that, under the facts, the plaintiff was not entitled to the injunction or other relief. Defendant denied that he had acted in bad faith, or was inflicting any legal injury upon the plaintiff. He denied that he was hopelessly insolvent, but admitted that his assets, which consisted of personal property only, would not, if sold at public outcry, net more than enough to pay what he owed. He alleged:

Before signing the agreement, plaintiff called his attention to the stipulation in question, and said that it had been put in by the lawyer as a matter of form, and that he (plaintiff) doubted its legality, and gave defendant to understand that he need not apprehend its enforcement. Before the agreement was entered into, certain residents of the town of Oliver had advertised in the newspaper that a physician was needed in the town, and plaintiff, understanding that defendant might locate in Oliver, induced him to sign the contract, with the purpose of thereby getting rid of defendant's competition. This purpose was fraudulent, and vitiated the contract, if otherwise legal. During the continuance of the partnership, and before any notice of dissolution was given, plaintiff so conducted himself with reference to the defendant as to deprive him of the possibility of gaining any advantage from the association, and made the partnership the means of injuring and damaging defendant, and of efforts to blast his good name and prospects. Plaintiff, before the notice, circulated reports which were untrue and unfounded, reflecting grossly upon the character and life of defendant, and which are set out in the answer. Plaintiff did not comply with his obligations under the contract. He declined upon different occasions to practice with defendant, declined to recognize notes addressed to the firm in the firm name, and announced that he would not notice any request for a visit that was not addressed to him personally. While the copartnership continued, plaintiff announced that he intended to ruin defendant, and would drive him out of the country.

As to these allegations the evidence at the hearing was conflicting. The court, after hearing the evidence, ordered that a temporary injunction as prayed for be granted, unless a bond with security, conditioned to pay the eventual condemnation money, should be given by the defendant within 45 days from the date of the order. Defendant excepted.

LITTLE, J. Counsel for plaintiff in error, both by his argument and brief, rests his case on the proposition that the petition on which the judge below granted an injunction in default of bond sets forth no cause for relief, because the contract sought to be enforced is not a legal and binding instrument. Hence this court is called upon to determine the question whether the contract which is set out in the foregoing report is void, as contrary to public policy, or whether the same is valid, and therefore to be enforced.²⁵

²⁵ An extended review of the authorities is omitted.

The remaining objections urged against the validity of the contract may all be passed upon in considering the other question upon which the validity of the contract depends, namely, is the restraint which it imposes reasonable?²⁶ While public policy forbids any agreement which unreasonably restrains a person from exercising his trade or business, it is equally true that public policy also requires that the freedom of persons to enter into contracts shall not be lightly interfered with. *Clark, Cont.* p. 447. The contract under consideration imposed a restraint unlimited as to time, but limited as to space. We are aware that it has been repeatedly held that, where the restraint is otherwise reasonable, the circumstances that it is indefinite as to time will not affect its validity (1 *Whart. Cont.* § 432; *Metc. Cont.* p. 232; *Benj. Sales*, § 525; *Hitchcock v. Coker*, 6 *Adol. & E.* 438; *Pemberton v. Vaughan*, 10 *Q. B.* 87; *Catt v. Tourle*, 4 *Ch. App.* 654; *Cook v. Johnson*, 47 *Conn.* 175; *Bowser v. Bliss*, 7 *Blackf.* 344); and that our court, in more than one case, which will be presently referred to, held the same doctrine. Nevertheless, if the test of the validity of the contract is, as we have shown it to be, that it must be founded on a valuable consideration, and that the restraint imposed must be reasonable, and such as is reasonably necessary to protect the interest of the party in whose favor it is imposed, and at the same time not unduly prejudice the interest of the public, it seems to us that the question of time in the restriction imposed cannot be arbitrarily said to have no effect on the validity of a contract which, being reasonable in all other respects except in point of time, is, from the circumstances, unreasonable and oppressive as to the latter. See *Mandeville v. Harman* (*N. J. Ch.*) 7 *Atl.* 37; *Keeler v. Taylor*, 53 *Pa.* 469.

In the case of *Hitchcock v. Coker*, *supra*, Lord Denman, construing a contract which imposed a restraint on one who, having entered the service of the plaintiff (who was a druggist), agreed that he would not at any time after leaving such service engage in the business of a druggist in that town, said: "It is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant as long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead;" and he accordingly held the restraint to be unreasonable and oppressive. That case was reversed on writ of error, but the point of reversal was that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the good will of his trade; and, as we understand the principle ruled in that case, a restriction so extensive is reasonable, and not oppressive, when it prevents the destruction of a property right or interest or the good will of a trade or business. See review of the case in *Clark, Cont.* pp. 455, 456. The contrary of this

²⁶ A part of the opinion, considering other aspects of such contracts and reviewing the authorities, is omitted.

doctrine, however, is directly held in *French v. Parker*, 16 R. I. 219, 14 Atl. 870.

With conflicting authorities as to the application of the rules for testing the validity of contracts in partial restraint of trade, upon which all agree, we think a clear distinction must be taken between the class of cases binding one who has sold out a mercantile or other kind of business, and the good will therewith connected, not to again engage in that business within a given territory, and that class of cases binding one to desist from the practice of a learned profession. I can readily perceive that a successor of a merchant, broker, or shopkeeper might reasonably expect to retain the former patronage of the place of business, but fully concur with the views expressed by the court in the case of *Mandeville v. Harman*, *supra*, that professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die with him. In that case the court said: "There can be no doubt, I think, that if the complainant was the most distinguished physician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his good will or practice, as a thing of property distinct from the office which he had occupied prior to his death, for any price; and I think it is equally obvious that, if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that, when he ceases to exist, it necessarily ceases also, and after his death can have neither an intrinsic nor a market value. And, if the complainant should make sale of his practice in his lifetime, it is manifest all the purchaser could possibly get would be immunity from competition with him, and, perhaps, his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had."

We test this contract by the rules before referred to, and find it supported by a legal consideration. Being limited as to space, although unlimited as to time, we find that it may properly be classed among contracts in partial restraint of trade. When we seek its terms to ascertain whether it is reasonable, made to protect the promisee, and not oppressive on the promisor, we find that no money was paid by the promisee, and no property sold by the promisor. We find that the promisor, by the nature of the contract, must have rendered service for all the benefits he received. We find that, under the terms of this contract, if the promisee, the defendant in error, should remove from the town of Oliver, from the state of Georgia; if he should be-

come permanently incapacitated, by disease, from continuing the practice of medicine; if he should die—the promisor, in any event, would not be at liberty to practice his profession in Oliver, nor within 15 miles radius of that town. No matter what the changed conditions might be, it was so nominated in the bond that he should not exercise his calling within the territory prescribed. It must be clear, therefore, that the restrictions imposed upon the promisor in this contract were larger than were necessary for the protection of the promisee. Full protection would have been afforded to the latter if the time in which the restraint should apply had been limited to the life of the defendant in error, or to the time in which he was engaged in the practice of his profession in the county of Screven. Had this contract been so limited, it is obvious from the view which we take of the law that it should be upheld and would be enforced. But, when the terms of the contract prohibit one party from at any time in the future practicing his profession at a given place, without regard to the fact that the other party should not be engaged in the competitive business, without regard to the fact that he may have removed from the county and state, in which such territory was located, without regard to the fact of the inability of the party, from age or physical infirmity, to continue his practice, it would seem to be unreasonable—not necessary for the protection of the party in whose favor the restraint was imposed, oppressive to the party restrained, and opposed to the interests of the public; and, such being the case, the contract cannot be enforced. If it be said that it would be the right of the plaintiff in error, under any of the circumstances we have mentioned, to pray for a modification or rescission of such contract, the reply is that we are not dealing with such question. We are to construe it as it is written, and, so construing it, we hold it to be void and of no binding force and effect.

The judgment of the court below must be reversed. All the justices concurring, except COBB, J., absent for providential cause.

ROWE v. TOON.

(Supreme Court of Iowa, 1918. 185 Iowa, 848, 169 N. W. 38.)

Action in equity to enjoin the defendant from pursuing the practice of medicine and surgery in Crawford county, Iowa. Decree as prayed, and defendant appeals.

WEAVER, J. For some years prior to the 18th of September, 1912, the defendant, Toon, was engaged in the practice of medicine and surgery at Dow City, in Crawford county, Iowa. In July, 1912, the plaintiff, a young man who was a graduate of the Medical Department of the Iowa State University, and holder of a certificate of due qualification from the state board of medical examiners, came to Dow City and entered into negotiations with Dr. Toon for the purchase of the latter's business. The parties reached an oral agreement where-

by, in consideration of the sum of \$1,000 to be paid by the plaintiff, part down and remainder in one or more deferred installments, the defendant would relinquish his business to the plaintiff and retire from the practice in Crawford county for a period of 10 years. As plaintiff would not be ready to move to Dow City before the following September, it was also agreed that defendant should continue his practice there until plaintiff arrived, and for a period of 30 days thereafter would remain with plaintiff, introducing him to his patrons and giving such proper assistance as he could in getting plaintiff started in the practice there. At the time of the oral agreement plaintiff paid defendant \$100; it being understood that a further cash payment was to be made when the plaintiff arrived in September, and the remainder at a later date.

Plaintiff reached Dow City early in September, but, finding that another doctor had settled there, he complained to defendant that he was as yet without sufficient introduction to the people of the vicinity, and that his purchase of defendant's business was not likely to give him any proportionate advantage over the other stranger competing for local patronage. For the purpose of strengthening plaintiff's position in this respect, and to enable him, if practicable, to overcome or eliminate the unexpected competition, the parties agreed to enter into a nominal partnership for the period of one year, when defendant was to retire from the practice in that county. It was also agreed that plaintiff would pay down the further sum of \$200, and give defendant his promissory note for \$700, due in one year, which sum, with the \$100 paid in July, made up the amount of the original agreed consideration. As witnessi^{ng} this agreement, the parties signed a contract prepared and written by the defendant, as follows:

"Dow City, Iowa, September 18, 1912.

"I, L. B. Toon, party of the first, and F. N. Rowe, party of the second part, enter into an agreement to form a partnership for the practice of medicine and surgery in the town of Dow City and vicinity for the period of one year. This partnership can be terminated sooner by mutual consent. At the expiration of one year the party of the first part is to retire from the practice of medicine and surgery for the period of ten years in Crawford county. The consideration the party of the second part is to pay the party of the first part is \$200 cash on hand and promissory note for \$700, payable one year from date. In the event of failure to pay this note, the contract is null and void at the expiration of one year from date, and the party of the first part can continue the practice of medicine and surgery in the town of Dow City. Either party can have reasonable vacation. They are to pay equally in the livery teams.

L. B. Toon.

"F. N. Rowe."

Plaintiff and defendant continued for a time occupying the same office and to some extent practicing together, and apparently holding

themselves out as partners; but there seems to have been no division of earnings, each collecting and retaining the income derived from patients to whom he was called. In the spring of 1913, and before the year had expired, defendant withdrew from Dow City and settled in Denison, in the same county, where he pursued and still pursues the practice of his profession. When the note given by plaintiff was about to fall due, defendant wrote him, giving notice he would expect payment thereof. Plaintiff answered, saying that defendant had not kept his agreement, and that he (plaintiff) did not propose to buy any more "blue sky," pay him for his practice, and "still allow him to remain in the territory and carry on his practice." To this defendant replied that defendant could not expect him to live up to his contract until plaintiff paid the note; that the thing for him (plaintiff) to do was to pay the note, and he would then be in position to enforce the contract; and that when the note was paid he (defendant) was prepared to leave the territory. Thereupon plaintiff paid the note in full, since which time defendant has remained in Crawford county and continues to practice his profession therein. The plaintiff also introduced evidence tending to show that the defendant is insolvent and that a judgment against him for damages would be uncollectible. The defendant did not testify in his own behalf, nor did he offer any other evidence relating to the negotiations or contract between him and the plaintiff. On this showing the trial court found for the plaintiff, as we have already indicated.

Confining our attention to the points argued by the appellant for a reversal, they are as follows:

I. That the contract sued upon is unreasonable and oppressive in its restrictions, in that the area within which the defendant is to be excluded from the practice of medicine bears no just relation either to the practice which the defendant theretofore enjoyed, or to the practice which the plaintiff could reasonably expect to acquire or obtain, if left free from competition by the defendant.

That equity will refuse its aid to enforce a clearly unreasonable or oppressive contract of this nature may be admitted, but there is nothing upon the face of this particular agreement indicating that it is unreasonable or inequitable in any respect. It excludes the defendant from practice in Crawford county only. All the rest of the wide world is open to him; and even in Crawford county the period of exclusion is limited to 10 years. We cannot say as a matter of law that the restriction, either as to territory or to time, is unreasonable. It is not an unheard of or very unusual thing for a well-established physician of good repute to enjoy a practice coextensive with his county, and even a young physician, whose present practice is comparatively limited, both in the number of his patients and in the area in which he finds his patrons, may yet reasonably hope, if well qualified, to extend his practice much beyond the immediate vicinity of his

office or home. The contract sued upon not being unreasonable on its face, plaintiff was not required to negative the existence of possible conditions rendering it void or voidable. Defendant offered no testimony tending to show that the restraint provided for by his own voluntary agreement was materially greater than was necessary for the protection of the plaintiff in the enjoyment of the fruits of his contract, and the argument that such agreement operates oppressively, or in a manner to offend against public policy, finds no support in a fair and candid reading of the terms agreed upon and reduced to writing by the defendant himself, or in the nature or effect of the prior negotiations leading up to it. This conclusion has the support of the great weight of authority, as indicated by the precedents to which we shall soon refer.

But counsel say that, while there is a class of contracts by which the seller of a business may validly agree to reasonable restrictions against his re-entry into the same business in competition with his purchaser, yet such rule is not available to defendant in this case, because the defendant's agreement not to continue practice in Crawford county "is not incident or ancillary to any other contract of lawful purchase and sale," but is "no more than a bald agreement to pay a man not to practice his profession or exercise his trade." If we understand this somewhat cryptic statement, it is to the effect that a valid contract to refrain from a lawful business or occupation, even for a limited time or in a limited territory, can be made only where it is entered into as incident to or condition of the sale of something more substantial and tangible than the sale by a physician of his professional practice. The inference would seem to be that, unless the seller is disposing of some tangible property, like an office, or residence, or stock of instruments, medicines, or supplies, used by him in and about his business, there is nothing to support the so-called ancillary agreement to retire from his practice in that neighborhood. The position so taken cannot be successfully maintained. It is true it is a generally recognized rule that a mere agreement to retire and refrain from a given business and no more, is of no validity, and to sustain such a contract it must appear that the agreement was made in support of some other agreement—ordinarily a sale or transfer of something which the law recognizes as property or property rights which may be lawfully bought and sold. The purpose of such auxiliary agreement is the protection of the purchaser in the benefit of his contract against competition by the seller, and in many instances this protection is a matter of prime importance, without which the purchaser would not think for a moment of investing any money in the purchase of a business. That such protection for the purchaser of a professional practice may be lawfully contracted for is thoroughly well settled. *Holbrook v. Waters*, 9 How. Pr. (N. Y.) 335; *Doty v. Martin*, 32 Mich. 462; *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; *Gilman v. Dwight*, 79 Mass. (13 Gray) 359, 74 Am. Dec. 634; *Cole v. Edwards*, 93 Iowa,

477, 61 N. W. 940; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Bunn v. Gray*, 4 East. 190; *Timmerman v. Dever*, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Dwight v. Hamilton*, 113 Mass. 175; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Gordon v. Mansfield*, 84 Mo. App. 367; *Wolff v. Hirschfeld*, 23 Tex. Civ. App. 670, 57 S. W. 572; *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826; *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586.

A business or professional good will may be the subject of lawful sale, even when unaccompanied by the transfer of any so-called business plant or other tangible property. *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573. Such, also, is the effect of our own holding in *Roush v. Gesman*, 126 Iowa, 493, 102 N. W. 495, where it is said in substance that, while one doing business as a real estate agent cannot as incident to a sale of such business, transfer to the purchaser his authority as an agent, or vest him with the right to act for the seller's principals or patrons, he can, by selling his business and retiring therefrom, grant to the purchaser an opportunity to obtain such patronage without the handicap of his competition. This, we said, is a valuable right, which the seller can lawfully transfer, and is one which the courts will protect and enforce. It is too clear for argument that a person having an established practice as a lawyer or physician may sell his business, and by binding himself to refrain from all competition with his purchaser for a reasonable time, and within reasonable territorial limits, he can vest his purchaser with a valuable opportunity, and that such an agreement is not to be condemned or avoided as without consideration, or as being forbidden by any sound principle of public policy. True, the lawyer cannot (in this way) sell his clients, or the doctor sell his patients, or their individual patronage, or their individual good will; yet he can, by such sale and by an honest observation of his covenant not to embarrass his purchaser by competition, confer upon him a real advantage and hasten the acquisition of business by him on his own account, and the courts should be slow to establish any rule or precedent by which any person can make a pretense of such sale, and, having received the stipulated price therefor, immediately repudiate its obligation and take from his purchaser the sole and only consideration upon which he parted with his money.

II. It is said in argument that upon the plaintiff's own testimony the transaction was not the purchase of the defendant's business or of its good will, but a mere agreement by the defendant to leave Crawford county, and that such an agreement is clearly void. The plaintiff does state that defendant was to leave the county, or promised to leave, and that he paid the money, or agreed to pay it, in consideration of such promise or words to that effect. It is perfectly manifest,

however, when one reads all of plaintiff's testimony in the light of the undisputed facts, that, while defendant did say that he would leave the county, it was only another form of expression for his promised withdrawal from the practice of his profession in the county, and it is with this thought only that plaintiff makes use of the language on which counsel seek to defeat his claim to relief. Had defendant remained in the county and withdrawn from practice therein, as he agreed to do, plaintiff would have had no ground for complaint, and we may safely assume that this action would not have been brought. *Haldeman v. Simonton*, 55 Iowa, 144, 7 N. W. 493.

The further point is made that the contract between the parties and the payment of money was in pursuance of an unlawful conspiracy in restraint of trade. This argument is based upon plaintiff's testimony that when he returned to Dow City to complete the deal with defendant, and found that another physician had settled there, the agreement made in July previous was modified, or rather was supplemented, by the agreement for a nominal partnership, and for defendant to remain at Dow City a while longer, to introduce the plaintiff to the people and aid him in getting started, hoping thereby to head off competition by the new practitioner and perhaps to induce him to abandon the field. What the result was in this respect does not appear, nor is it material. The partnership, whatever its character or extent, was abandoned before the year was out, and defendant removed to Denison. There is nothing in the agreement of an unlawful character. There was no undertaking to interfere in any manner with the business or practice of the physician referred to, or to reflect upon his character or standing or professional capacity. Plaintiff's agreement to pay the \$1,000 had been made two months before the incident above mentioned, and the writing made in September was no more than the consummation of that agreement with the added arrangement for a form of temporary partnership. It affords no ground for defense against the plaintiff's demand for a performance of the contract.²⁷

IV. Counsel for defense declare their "earnest belief that the time will come when the mere fact that the subject of any such bargain, as this case exhibits, is one of the professions, will vitiate it," and their argument in large part consists of an ingenious attempt, not alone to sustain the defense in this case, but to undermine and discredit the principle on which the doctrine of the precedents is based. This is a field of academic discussion upon which we do not care to enter. It is enough to say that, while there has been some apparent divergence, and perhaps some inconsistencies, in the practical application of the rule to particular cases, there is no substantial conflict anywhere upon the proposition that a professional practice is a lawful subject of sale, and that equity will protect the purchaser against the competition

²⁷ The discussion of a question relating to the plaintiff's license to practice medicine is omitted.

of a seller who has contracted to surrender the good will of his business to the buyer. There is nothing inherently vicious in the rule, and we are content to abide by it.

In closing it is proper to notice counsel's appeal to the court to uphold the high ethical standards of the medical profession by denying the plaintiff's prayer for relief. Touching this subject they say:

"It cannot be the policy of the state to encourage or permit violations of the ethics of the profession, as agreed upon generally by the profession. It is surely the policy of the state to discourage—if not to forbid—practices which tend to lower the standards and traditions of the profession."

This proposition of counsel has our complete and cordial acquiescence, and so far as this case is concerned there is no better or more appropriate way to emphasize our concurrence in the principle they contend for than to compel their client to uphold the standards and traditions of his profession by exhibiting common honesty in the performance of his contracts. The record shows, as we have seen, that the appellant voluntarily entered into the contract to sell his business and to refrain from further practice in the county, and that in consideration of that agreement he demanded and received \$1,000. It further appears without dispute—indeed, he admits of record—that he has never ceased his practice in the county, and that, while removing to another town, he still returns to Dow City for the treatment of patients. For this open and flagrant violation of his contract he offers no explanation or excuse, nor does he return or offer to return the money paid him, but asks the court to permit him to escape with it on the theory that his agreement was stamped with illegality to such a degree that plaintiff ought not to have any relief. There may be cases in which such a plea is sustainable, but this is not one of that happily infrequent kind.

The decree is clearly right, and it is affirmed.

BRETT v. EBEL.

(Supreme Court of New York, 1898. 29 App. Div. 256, 51 N. Y. Supp. 573.)

Appeal from Trial Term, New York county.

Action by Pierre A. Brett against Martin C. Ebel and William G. Brett. From a judgment dismissing his complaint, plaintiff appeals.

The action was brought to recover the sum of \$300, under a contract between the plaintiff and the defendants, the material parts of which are as follows: "Whereas, both parties are engaged in the business of shipbrokers, chartering vessels for various ports in the West Indies and South America; and whereas, the party of the second part (the plaintiff here) has built up a business in freighting vessels for Port au Prince, Haiti, and has established a line known as 'Brett's

Line, Haiti Packets'; and whereas, the parties of the first part (the defendants here) are desirous of acquiring such business and said line: The party of the second part hereby transfers and sells to the party of the first part all his interest and good will in the business of freighting vessels for Port au Prince and said Brett's Line, Haiti Packets (not including any right to use that name), and for the term hereinafter mentioned agrees not to solicit freights nor do any business with Port au Prince in or from any place or places in the United States east of the Mississippi river, except that he may, as a broker, effect charters for vessels to and from Port au Prince, and may sell to merchants merchandise for Port au Prince. * * * The parties of the first part agree to pay the party of the second part the sum of eighteen hundred dollars a year, in equal monthly payments in advance, beginning on the 7th day of November, 1894, during the term hereinafter mentioned. This agreement shall continue in force for as long a time as shipments are made to Port au Prince by H. Becker & Co., of the city of New York, or their successors; but in no event shall the term be less than five years." The plaintiff proved the execution of this contract and its performance upon his part. Thereupon he rested. The defendants' counsel then moved to dismiss the complaint upon the ground that the contract was a nudum pactum; that the plaintiff had no good will or interest in trading vessels which he could sell; and that the contract was contrary to the act of Congress passed July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The motion was granted, and plaintiff excepted. The plaintiff then asked leave to go to the jury upon the various questions presented by the evidence, but his request was denied, to which denial he excepted.

BARRETT, J. The defendants claim that the right to solicit freights to Port au Prince was not a right that the plaintiff could sell, and consequently that it furnished no valid consideration for the contract in question. The contention proceeds upon a misconception of the nature and scope of the contract. What the plaintiff thus sold to the defendants was the good will of his freighting business. He had been engaged in this business for some 15 years, and he was well known in it. He testified that the best shippers to Port au Prince had always given him the preference in their shipments to that port. The business was a valuable one, and its good will was essentially desirable. The defendants also contend that the contract was without consideration, because no material "plant" was involved in the transaction. But the good will of a business may be sold independently. A physician may sell the good will of his practice without selling his office furniture or his surgical instruments. So a lawyer may sell the good will of his clientage without selling his library. The same rule applies to the good will of a mercantile business; in fact, to good will generally.

The contract in question involved no unreasonable restraint of trade, within the rules laid down in *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419. The plaintiff's covenant here was necessary to effectuate the object of the sale of his good will. If such a covenant were illegal, it would seriously affect the sale of any man's business, where the element of good will entered into the transaction. The covenant in question is generally an important incident of every such sale. The probability, or even the possibility, of subsequent competition on the seller's part, would certainly prevent him from securing the full value of his property from any sensible or prudent purchaser. The covenant here is the ordinary one attached to such sales, and it is clearly valid. The rule laid down in the case cited has been frequently reaffirmed, and it is now the settled law of this state. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469; *Underwood v. Smith* (Com. Pl.) 19 N. Y. Supp. 380, affirmed 135 N. Y. 661, 32 N. E. 648; *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980.

The remaining question is whether the contract is invalid under what is known as the federal "Anti-Trust Act." The defendants claim that it is invalidated by the first section of that act, which provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. 26 Stat. 209. It was held by the Supreme Court of the United States in the case of *U. S. v. Trans Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, that these prohibitory provisions apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation, and that they are not confined to those in which the restraint is unreasonable. The opinion in that case, however, must be read in the light of its facts. The contract there was not founded upon or connected with any sale of property or good will. Thus the restraint was not ancillary to any lawful contract. The particular contract there under consideration was one which was entered into between competing railroads, for the purpose of thereby affecting traffic rates for the transportation of persons and property.

We find nothing in the opinion to warrant the extreme view taken by the defendants here. On the contrary, we find language suggestive of the opposite, and certainly the more reasonable, view. "A contract," said Judge Peckham, at page 329, "which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question." It should be observed that the act which was there under consideration was entitled "An act to protect trade and commerce against unlawful re-

straints and monopolies." The word "contract," in the first section, is joined with the words "combination" and "conspiracy," thus plainly indicating the mischief aimed at by Congress. The history of that act emphasizes this view. It was clearly aimed at the so-called "trusts," or monopolies, now so familiar in this country, whose main object was the restraint of trade. The intention was undoubtedly to declare every contract illegal which was in the line of these evils. But it certainly was not intended to prohibit a man from selling his business in the ordinary way, and from thereupon obtaining the full value thereof through the instrumentality of an incidental, covenant not to compete with the purchaser within some limited area.

The rules upon this subject are very fully and clearly stated and the cases reviewed in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271. The covenants which are generally upheld are there classified by Judge Taft, and that under consideration is within the first of the classes to which he refers, namely, covenants "by the seller of property not to compete with the buyer in such a way as to derogate from the value of the property or business sold." In our judgment, the present contract is not in contravention of this federal act. It certainly is not within its spirit. If that act were to be construed literally and technically, so as to embrace such a contract as the present, it would involve consequences most harmful to the commercial community—consequences which, in our judgment, were never contemplated by the lawmakers.

We think, therefore, that the dismissal of the complaint was erroneous and that the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide event. All concur.²⁸

MAPES v. METCALF.

(Supreme Court of North Dakota, 1901. 10 N. D. 601, 88 N. W. 713.)

YOUNG, J. The plaintiff brings this action upon a covenant contained in a written contract executed by the defendants R. L. Metcalf and Meldonetta Metcalf in favor of one E. Mapes, and duly assigned by said Mapes to the plaintiff prior to the commencement of this action. Plaintiff demands a money judgment, and an accounting by the defendants for moneys alleged to have been received by them under said contract. Thomas J. Baird and Mary A. Rayburn are sureties on an undertaking given to secure said contract, and are made defendants herein. The defendants answered jointly, admitting the execution of the contract and bond in suit, but denying all liability thereunder, and denying that Mapes had complied with his covenants in said contract. The trial was to the court without a jury. The issues of fact as to the

²⁸ This case is cited with approval in *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357 (1901).

amount of plaintiff's damages were not tried, and no accounting was had. Prior to the trial of the case in the district court, upon stipulation of counsel for the respective parties an order was entered of record by the presiding judge to the effect that the "issue as to the damages plaintiff may be entitled to recover herein be, and the same hereby is, reserved for trial and determination at such future time as may be fixed by the court, in the event that, after the trial and determination of the other issues in this case, it shall be necessary to try such issue." Evidence was offered upon all other issues than that reserved, and, from the facts established by the evidence so offered, the court found, as a conclusion of law, that the plaintiff was not entitled to recover upon said contract. Judgment was ordered and entered dismissing the action, and awarding costs to the defendants. Both parties have appealed from the judgment.²⁹

We now turn to plaintiff's appeal. The only question for determination is whether the contract sued upon is void. It appears from the findings of fact contained in the record that on and prior to January 2, 1894, E. Mapes was the owner and publisher of a newspaper known as the "Nelson County News," published at Lakota, in Nelson county, and operated a job-printing plant in connection therewith. The defendants R. L. Metcalf and Meldonetta Metcalf were the owners and publishers of a newspaper known as the "Observer," published at the same place, and they also operated a job-printing plant. On January 2, 1894, the parties entered into a written contract, which, as far as material, is as follows:

"* * * For and in consideration of the discontinuance of the Nelson County News, now published as aforesaid, on or before February 9th, 1894, and of the covenants and agreements of the said E. Mapes to do no job work or printing of any kind or nature whatsoever for parties resident of Lakota, and agreeing to neither re-establish the Nelson County News as a newspaper at Lakota, or to directly or indirectly countenance or assist in the establishment of another newspaper at Lakota, or at any other point in Nelson county, for the term of five years from the date of this agreement, the said R. L. Metcalf and Meldonetta Metcalf, for themselves, their heirs, executors, and assigns, agree to and with the said E. Mapes, his heirs, executors, and assigns, to pay to the said E. Mapes one-half of all moneys received by them for the publication of legal notices for a term of five years from date. * * * That these payments shall be made on the first day of each month for such publications as shall be completed any time during the preceding month. * * * That they shall be allowed the sum of twenty cents per thousand ems for composition on all legal notices as above described. * * * It, however, is especially understood and agreed that, if at any time the said R. L. Met-

²⁹ Only the part of the opinion relating to the plaintiff's appeal is printed.

calf and Meldonetta Metcalf shall make a bona fide sale of the plant referred to, they shall be allowed to commute the balance remaining due on this agreement at the rate of \$150 per annum for such time as shall be unexpired. * * *

It further appears that said E. Mapes has fully complied with all his covenants and agreements contained in said contract; that since January 2, 1894, the defendants have continued the publication of the Observer, and during this time have published legal notices therein of the kind covered by the agreement; that said defendants paid to E. Mapes under said contract the sum of \$707.16—the last payment having been made in November, 1895; that since that date they have refused to make any further payment; that said E. Mapes assigned his cause of action on the contract to compel an accounting to the plaintiff, L. E. Mapes, prior to the commencement of this action. The trial court not only found that E. Mapes discontinued the publication of his paper, but that he also turned over the subscription list and good will of said paper and printing business to defendants. The facts thus far narrated present all that is necessary for a determination of the questions presented by plaintiff's appeal.

The trial court found, as a conclusion of law, that the contract in question is in restraint of trade, and is void as against public policy, and that no action, therefore, can be maintained thereon. The appellant assigns error upon this conclusion, and the correctness of this conclusion is the only question presented for determination. We are not able to agree with the trial judge that the contract in question is void. The principles upon which contracts in restraint of trade have been held void by the courts of England and this country proceed upon the theory that the public welfare demands that private citizens shall not be allowed, even by their own voluntary contract, to restrain themselves unreasonably from the prosecution of trade, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. Just what amounts to a reasonable restriction becomes a question of much delicacy, to be determined upon the facts peculiar to each case. In this case, however, we are freed from the embarrassment of judicially determining whether the restraints imposed by this contract are reasonable or unreasonable, by an express statute upon the subject. Section 3926, Rev. Codes 1899, provides that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind otherwise than as provided by the next two sections is to that extent void." Section 3927, Rev. Codes 1899, provides that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or a part thereof so long as the buyer or any person deriving title to the good will from him carries on a like business therein." "The good will of a business is the expectation of continued public patronage, but

it does not include the right to use the name of any person under whom it was acquired." Section 3486, Rev. Codes 1899. "The good will of a business is property, transferable like any other property." Rev. Codes 1899, § 3487. See, also, section 3267, Rev. Codes 1899. And "one who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers." Section 3983, Rev. Codes 1899.

The good will of one's business, although intangible, is deemed by the law to be a thing of value, and is adequate as a consideration for the promise of a purchaser, and may form the subject-matter of a contract of sale, in whole or in part. *Cruess v. Fessler*, 39 Cal. 336; *Herrfort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Bank v. Warren*, 94 Wis. 151, 68 N. W. 549; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357; *Bish. Cont.* § 65, and cases cited. It has always been held lawful for the vendor of the good will of a business to bind himself to refrain from conducting a like business within a limited territory and for a limited period, provided, only, that his agreement to refrain shall be no more extensive than is necessary to secure to the vendee the fruits of his purchase. Such covenants are ordinary incidents to the sale of the good will of a business. Hence the question in these cases is whether the agreement to refrain was necessary to secure to the purchaser the fruits of his purchase.

In the case at bar this question is settled in favor of the validity of the contract involved in this particular by section 3927, Rev. Codes 1899, above quoted. The restraint imposed by the contract is within the territorial limits authorized by said section. It is contended, however, that the agreement to refrain from carrying on a business must be auxiliary and collateral to a sale of the good will of the business; that is, the transaction must involve more than a bare agreement to refrain. We think this construction is entirely sound, and that it follows necessarily not only from the language of the section, but from its purpose, which is to permit a purchaser to secure the property which he buys, namely the good will of a business. The question which is entirely decisive of this case, then, is this: Did Mapes sell to the defendants the good will of his business?

It is contended by counsel for defendants that the transaction was purely and simply an agreement on the part of Mapes, for the consideration named in the contract, to refrain from doing business, and that there was no sale of the good will whatever. This evidently was the view taken by the trial court. We reach an opposite conclusion, and are of opinion that the facts found by the trial court fairly establish

that Mapes sold the good will of his business to defendants, that such sale furnished the consideration for defendants' promise to pay contained in the contract, and that Mapes' agreement to refrain from publishing a newspaper and doing job printing within the time and territory limited by the contract was collateral to such sale, and was for the purpose of securing to the defendants the good will so purchased. It is true, the contract does not use the words "good will," but that fact is not controlling. The contract shows upon its face that, at and prior to the making of the contract, Mapes was conducting a newspaper and job-printing business in Lakota, at which point the defendants also conducted a newspaper and job-printing business. The good will of his business, as we have seen, was property of a greater or less value. In consideration of the defendants' promise to make the payments named in the contract, Mapes agreed (1) to discontinue his business; (2) to refrain from following it for the time and within the territory named in the contract. This agreement, as we have already seen, he has fully performed.

These provisions, in our judgment, evidenced a sale of the good will by Mapes to the defendants. No other deduction seems possible. Mapes, it is conceded, did not sell and transfer to the defendants any portion of his printing plant, or, in fact, any tangible property. He did, however, surrender his business, and did so in pursuance of the contract in question. It is evident that the covenants of the defendants in the contract were to compensate Mapes for the benefits which they expected to derive from his surrender of his business. We conclude that the necessary legal effect of the contract was a sale by Mapes, for the consideration therein named, to the defendants, of the good will of his business. Such was the construction placed by Mitchell, J., upon a contract somewhat similar in *National Benefit Co. v. Union Hospital Co.* (Minn.) 47 N. W. 806, 11 L. R. A. 437. In this view, the contract shows upon its face that the defendants' promise to pay, upon which this suit is brought, is based upon a lawful consideration.

In this case, however, we are not confined to the uncertain language of the contract in determining what the transaction was, for the fact is expressly found that Mapes not only discontinued the publication of his newspaper as agreed, but that he also, as a part of the transaction, turned over his subscription list and the good will of his paper and printing business to the defendants. It is true, the fact of the turning over of the good will and subscription list is not mentioned in the written contract, and is a fact which is entirely outside of the contract, but that is entirely immaterial. The inquiry here is whether the defendants' promise is based upon a sufficient and lawful consideration? The consideration expressed in the written instrument is not conclusive; it may be explained or contradicted; and, under the modern rule, it may be shown that the instrument does not state the whole consideration, but that there were other considerations between the parties in

addition to that expressed. *Levering v. Shockey*, 100 Ind. 558; *Nichols, Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737; *Coles v. Soulsby*, 21 Cal. 47; *Bank v. Aull's Adm'r*, 80 Mo. 199; 6 Am. & Eng. Enc. Law (2d Ed.) 772.

The contention of the defendants' counsel that the omission of the written contract to recite the transfer of the good will and the subscription list by Mapes to the defendants renders such transfer entirely immaterial and voluntary cannot be sustained. As we have seen, it is competent to prove the true consideration. We are of opinion that the transaction in the case at bar involved a sale by Mapes of the good will of his business, and his agreement to refrain from conducting a similar business was merely collateral to such sale, from which it follows, of course, that the contract in suit was one authorized to be made by section 3927, Rev. Codes 1899, before quoted, and that defendants are liable on the covenant sued upon in this action. A large array of authorities are cited by counsel for both parties relating to contracts in restraint of trade. We believe that, without exception, they are cases wherein the aid of the courts was invoked either to enforce covenants in restraint of trade, or to recover damages for breaches of such covenants.

The question in the case at bar is entirely different. Here the contract to refrain has been fully performed, and the present action is to recover on defendants' promise to pay for the benefits which they have concededly received. Whether they could defeat a recovery if the contract were in fact illegal, as in restraint of trade, after having received all of the benefits thereunder, we do not determine. The statute above referred to is, of course, controlling on the question of the legality of this contract. * * *

For the reason stated, the judgment will be reversed, and the case remanded to the district court for further proceedings, and it is so ordered. All concur.

WESTERN WOODEN-WARE ASS'N v. STARKEY.

(Supreme Court of Michigan, 1890. 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.)

LONG, J. The bill in this cause is filed for the purpose of having the defendants Starkey, Ferris, and Olmsted enjoined from engaging in the business of manufacturing pails, tubs, and other articles of woodenware during the period of five years, from the 29th day of June, A. D. 1888; to enjoin the other defendants from carrying on that business with them; to enjoin all the defendants from using certain premises in the village of St. Louis, Gratiot county, for the purpose of manufacturing tubs, pails, etc. The bill asks for an accounting touching complainant's damages, for a decree requiring the same to be paid, and there is also a prayer for general relief. The bill shows

that the complainant is a corporation organized under the laws of the state of Illinois for the purpose of carrying on the business of manufacturing, buying, and selling woodenware, and the materials which enter into woodenware; that it was engaged in the business prior to June 29, 1888; that on that date the defendants Starkey, Ferris, and Olmsted were doing business at St. Louis as partners under the name of the St. Louis Woodenware Company; that they were engaged in business similar to that of complainant, and owned and occupied certain premises, with a manufacturing establishment, and were possessed of a large quantity of manufactured articles, materials, tools, and other chattels used in their business; that on that date the complainant and the members of said copartnership entered into a contract which is attached to the bill, the material parts of which will be referred to.

By this contract, the firm, in consideration of \$6,000, agree to sell to the complainant their stock on hand, materials, tools, implements, and chattels. The contract contains this clause: "And the said first parties also agree not to become engaged in the manufacture of tubs and pails during the next five years in the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana, and Ohio, or allow their property at St. Louis, Mich., to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party \$2,000 for damages, for violating this contract." The contract also contains certain other provisions not necessary here to be noticed. After making the contract the complainant paid the copartnership the \$6,000, and received the chattels. The defendants Starkey, Ferris, and Olmsted violated the contract in that they are now engaged in the manufacturing and selling woodenware in the premises in question, and, as the bill alleges, have confederated with the other defendants Palmerton, Fowler, and Newman to carry on the business with them, and, for the purpose of concealing their transactions, procured the defendants Palmerton, Fowler, and Newman to organize a corporation under the name of the F. G. Palmerton Wooden-Ware Company, Limited, with intent to engage in said business.

The bill further charges that the defendant Starkey pretended to convey the lands in question to his son-in-law Palmerton; that Palmerton has conveyed them to the Palmerton Wooden-Ware Company, and that the business of manufacturing woodenware has been carried on in said premises by the Palmerton Wooden-Ware Company; that the defendants Starkey and Ferris have active supervision, control, and management of said corporation, and have been making sales of their pails and tubs in all the states of Michigan, Wisconsin, Illinois, Iowa, Missouri, Indiana, and Ohio. The bill charges that the corporation so organized by the defendants is a mere pretense and cover procured to be organized by the defendants Starkey and Ferris; that

Starkey and Ferris furnished the capital therefor; that the stock of the corporation is held for their benefit and advantage; that the breach of the contract on the part of the defendant has greatly injured and damnified the complainant.

To this bill the defendants filed a general demurrer, which the circuit judge sustained; and on the 14th day of March, 1890, entered a decree dismissing the bill. From this decree complainant appeals.

Complainant's counsel raised but three questions in this court: (1) That the clause of the contract wherein the defendants Starkey, Ferris, and Olmsted agree not to become or engage in the manufacture of tubs, etc., during the next five years, in any of the eight states named, or permit the premises in question to be used for that purpose, without the consent of the complainant, is valid; (2) that the clause of the contract which provides "in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party \$2,000 for damages for violating this contract," does not preclude the complainant seeking relief by injunction; (3) that Act No. 225 of the Public Acts of 1889, declaring certain contracts, agreements, undertakings, and combinations unlawful, and to provide punishment for those who shall enter into the same, or do any act in the furtherance thereof, has no application in this case.³⁰

From the view we take of this case, we need discuss but one question. The contract must be declared void on the ground of public policy. The cases cited by counsel for complainant do not sustain the doctrine he contends for here. This case does not fall within that class of cases where contracts have been upheld though the parties, by the contract, were to abstain from carrying on the same business for a particular length of time, and within a designated territory. In *Hubbard v. Miller*, 27 Mich. 15, the complainant was engaged in carrying on the business of a general retail hardware store, in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking drive wells, and was also carrying on the business of putting down drive wells. Two of the defendants, Miller and Decker, partners under the firm name of George W. Miller & Co., kept a like hardware store in the same city, and like the complainant kept on hand the tubing and other materials used in putting down such wells, and were also engaged in putting them down for those who chose to employ them. Complainants purchased the stock, tools, etc., of the defendants Miller and Decker, and paid their price on condition that they would cease to do that kind of business, and would not keep well drives, tools, and fixtures. The defendants violated this contract. The firm of George W. Miller & Co. was dissolved, and afterwards reorganized, with the defendant Akeley as a member of the firm. The new firm shortly after went into business, and kept the

³⁰ The opinion has been abridged by omitting the résumé of the argument of counsel for complainant and a quotation from one of the cases.

same kind of tools and materials as complainant, and carried on the well-driving business. Defendant Decker went into business for himself, and also carried the same line of stock, and commenced putting down drive wells. It is true that this court, on the hearing here, granted a perpetual injunction. The court construed this contract as limited to the city of Grand Haven and vicinity.

It will be noticed that the circumstances surrounding that case and the situation of the parties show that the complainant purchased a business which was similar to the one which he was then carrying on, and which he continued to carry on thereafter in the same place. The public may have been as well served by this means as though the two or three firms continued the business. In *Beal v. Chase*, 31 Mich. 490, to which the learned counsel refers as sustaining his position, it appears that Chase was the publisher of a receipt book, and carried on the business of printing. Chase sold to Beal his printing establishment, the receipt book and copyrights, the good will of the business, and the right to use the name of Dr. Chase in connection with the book and business, and agreed not to engage in the business of printing and publishing in the state of Michigan, so long as Beal remained in the printing and publishing business at Ann Arbor. The whole business was turned over to Beal, and he was to fulfill all contracts entered into by Dr. Chase, and was to furnish the paper, the "Courier and Visitant," to all subscribers, etc. It appears that the business was to be carried on as Chase had carried it on, and the property purchased was devoted to the business in which it had theretofore been used. It was not, like the present case, closed up and taken out of the channels of business, and the court upheld and enforced the contract which the parties themselves had made.

The complainant here is a corporation organized and existing under the laws of the state of Illinois, and having its place of business in Chicago. It is alleged in the bill that they are engaged in the business of manufacturing, buying, and selling pails, tubs, and other articles of woodenware, and manufacturing, buying and selling staves, heading, hoops, and other articles of woodenware; also for the owning and operating machinery, tools, and implements connected with and used in the manufacture of pails, tubs, and other articles of woodenware; that it sells products in the eight great states named. It is not alleged by the bill that, in the making of the contract the complainant intended to take the business and good will of Starkey, Ferris, and Olmsted, and carry on the business of manufacturing these articles in this state; but, from the terms of the contract, it is manifest that they not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the state, and close the doors of the shops. Complainant did not purchase the realty. It purchased all the machinery there in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considera-

tions involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The state has the welfare of all its citizens in keeping, and the public interest is the polestar to all judicial inquiries.

Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the state. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great Northwest teaming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris, and Olmsted, and shut the doors of that shop, and prohibit their again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the state, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of \$2,000.

A somewhat similar question arose in *Wright v. Ryder*, reported in 36 Cal. 342. There a contract had been entered into for the purchase by the Oregon Steam Navigation Company of the California Steam Navigation Company of a steamboat called the *New World*, for the sum of \$75,000, and also an agreement by the Oregon Steam Navigation Company that the steamboat should not be run upon any of the routes of travel on the rivers, bays, or waters of the state of California, for the period of ten years thereafter. The validity of this contract was before the court, it being claimed that it was void on the ground of public policy, and it was held void, the court there saying:

"If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steamboats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this state for a period of 10 years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of 50 tons burden should be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this state for a period of ten years, it might produce great public inconvenience; whereas, if only one carpenter

or mason should enter into a similar contract, the loss of his service might not be felt by the public. And yet, in the latter case, we should be bound by a long line of adjudications in England and America to hold the contract void in restraint of trade."

In the present case, the defendants Starkey, Ferris, and Olmsted were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void as unreasonable restraints of trade, and therefore void on the ground of public policy.

The decree of the court below must be affirmed, with costs. The other Justices concurred.

UNITED STATES CHEMICAL CO. v. PROVIDENT CHEMICAL CO.

(Circuit Court, E. D. Missouri, E. D., 1894. 64 Fed. 946.)

This was an action by the United States Chemical Company against the Provident Chemical Company for rent, on a lease. Trial by the court, without a jury.

Action for rent. Defense that the lease is void, because antagonistic to public policy. On the 25th of September, 1888, the plaintiff company leased to Henry H. Welch, for the term of 10 years, from the 1st of September of that year, at a monthly rental of \$1,000 per month, in advance, the building and equipment then used by it for the manufacture of bone tartar in Camden, N. J. The mutual covenants are expressed in seven paragraphs. The first stipulates for the right of entry for default in the payment of rent, and is of the usual character. The second prohibits the assignment of the leasehold or an underletting without the written consent of the lessor. The third provides that, if the premises be destroyed by fire, the lessor shall have 20 days within which to elect to rebuild, and, if the lessor shall choose to rebuild, the rental should then continue for a period of three months, and not longer, until after the complete restoration of the rebuilding, when it would again revive. If the lessor elected not to rebuild, such determination concluded the term. The fourth is a covenant that in the event the buildings should be destroyed by fire, and the lessor elect not to rebuild, then the lessor will not engage in the manufacture of bone tartar so long as the lessee shall continue to pay the rental of \$1,000. The fifth assures to the lessee the right to remove any engine, boilers, tools, machinery, or fixtures placed upon the premises. The sixth relates to the prudent use of the premises, so as not to increase the risk by fire, and restricts the employment of the premises to the manufacture of bone tartar. The seventh and concluding covenant is as fol-

lows: "Said lessor, for itself, its successors, and assigns, hereby covenants to and with said lessee, his heirs, executors, administrators, and assigns, that it, said lessor, will not, during the period that this lease may be in force, and that the rent herein reserved shall be paid as it falls due, ever manufacture or sell any bone tartar."

On the day the lease was executed, it was, with the consent of the lessor, assigned to the defendant, a corporation organized pursuant to the laws of Missouri, and which, for many years antecedent, had been engaged in the manufacture of bone tartar at the city of St. Louis, and whose trade in that product extended throughout the United States, wheresoever there was a demand for that article. Although the lease was made to Mr. Welch, it was understood by both parties that he was merely the representative of the defendant company, whose officers had negotiated and consummated the terms of the trade. The plaintiff was organized as a corporation under the laws of New Jersey, and had for a number of years been engaged in manufacturing various kinds of chemical compounds, principally sulphuric acid, alum, rock tartar, fertilizers, and latterly bone tartar, at Camden, N. J. It used a separate building for each of the different kinds of its products, and each was operated by mechanical power derived from a common motor. The building which the defendant leased had no power, and unless supplied with engine, as seems to have been contemplated by paragraph 5 of the lease, or power rented from the defendant, would be useless for the manufacturing purpose for which it had been rented. The defendant points to this incident as a clear indication of a design, of which both parties must be cognizant, not to employ the building in the business to which it was especially adapted, but to close it up, so that the defendant would be in complete control of the trade in bone tartar. And there is some evidence that, in conversations attending the negotiations which culminated in the lease, the defendant expressed an intention not to operate the factory; and also that, at least for the immediate future, if the negotiations were concluded, the defendant would have complete control of the trade in the bone tartar commodity; and that this latter feature was utilized by the plaintiff to obtain the rental finally agreed upon.

"Bone tartar" is a coined term for the chemical compound "acid phosphate of calcium," and is obtained by treating calcined bone or fossil and kindred rock with sulphuric acid. Whether made of bone or fossil rock is not discernible in the finished product, either by taste, analysis, or effect in use. Bone and rock tartar are indiscriminately used as one of the prime components of baking powder. It was the trade of the manufacturers of baking powder that the defendant had been cultivating for years, and of which, so far as bone tartar, its exclusive product, was used, it had almost the exclusive patronage up to the time when the plaintiff began to produce bone tartar. The plaintiff's first manufacture of acid phosphate of calcium was from rock,

but, for two or three years before the date of the lease, it had added to its works, at Camden, the building leased to the defendant, especially adapted to the making of bone tartar, and early began to press this product upon the market, in competition with that of the defendant, and threatening to become a dangerous rival. The defendant, in order to protect its trade, conceived the idea of perpetuating its regency in this particular field by gaining control of the plaintiff's works whereat the rival product was made. Its efforts resulted in the lease which is the basis of this suit. The quality of the plaintiff's bone tartar was equal to that of the defendant's. While the manufacture of acid phosphate of calcium was open to the talent and capital of any one, yet, to successfully make it, great skill and experience were required, and this skill had only been attained by the plaintiff and defendant; with a few unimportant exceptions, up to the time of the lease. A Mr. McNab was the expert in charge of the plaintiff's works, and, after the execution of the lease, the defendant requested the plaintiff to endeavor to keep him in its employment in the other departments of its business, so that he might not engage in starting a business that would compete with the defendant's; and this the plaintiff, in a spirit of accommodation, consented, so far as it could with propriety, to do. The defendant, after the lease was made, purchased of the plaintiff all of its finished products, both of rock and bone tartar, and the raw material for making them. The raw material was sent to the defendant's works at St. Louis, and the manufactured sold from Camden to customers, including those who had been purchasers of the plaintiff, and to whom the plaintiff used its best endeavors to introduce defendant, under the name of the United States Tartar Company, the defendant thinking it prudent to disguise the fact that it had acquired the plaintiff's factory and bone tartar business.

The value of the leased premises is shown to be between \$17,000 and \$24,000 and the annual rental to be from 10 to 15 per cent. of this value, while the rental stipulated in the lease is \$12,000 per annum. Inasmuch as the lease contains no grant of the good will of the plaintiff, the defendant contends this large monthly sum is but the price which the plaintiff demanded for withdrawing its rivalry to the defendant; while, upon the other hand, the plaintiff contends that it is but a fair compensation for the profit it had been realizing and might reasonably anticipate from that particular branch of its business, and the use of the leased property; and I am convinced of the accuracy of the plaintiff's contention by the evidence. Up to May, 1893, the rental was promptly paid by the defendant. McNab, without the connivance of the plaintiff, had left its employment, and had started a factory for making bone tartar. Other rival institutions sprang up, and the prices of bone tartar were tending downward; and under these influences the defendant repudiated the lease, as contrary to the policy of the law. The plaintiff sues for the rent in arrear.

PRIEST, District Judge (after stating the facts). The question of moment in this case is whether the seventh covenant of the lessor, not to manufacture or sell any bone tartar during the period the lease may be in force, is in restraint of trade, and for that reason void. The transaction in which this restriction appears is the leasing of premises and equipment especially devoted to the manufacture of bone tartar. The rental value of the real estate and buildings was between \$2,000 and \$2,500. The profits derived by the plaintiff from making and sale of bone tartar were from \$10,000 to \$12,000 per annum at the time the lease was made. It is manifest that the inducement moving the plaintiff to lease the premises was to obtain a fixed and certain sum, rather than a contingent and uncertain one; and the motive of the defendant was to get rid of a dangerous and aggressive competitor in the trade of the article of which it was in practical control, and to the manufacture of which it was exclusively devoted. The plaintiff sought a trade for this article throughout the United States—an achievement which the defendant had already accomplished, being earlier in the field. In view of these conditions, is the covenant condemned by public policy?

The restraint extends literally everywhere, but a fair construction would limit it to the United States. If valid to that extent, we have no concern with the broader boundary. It is commonly and casually said that contracts in general restraint of trade are void. This rule, whatever may have been its earlier character, is now neither arbitrary nor inflexible. The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable. It is only where the restriction can be of no avail to the vendee, and unnecessarily hampers the vendor, that it becomes oppressive and void. *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658; *Ellerman v. Stock-Yards Co.* (N. J. Ch.) 23 Atl. 287; *Long v. Towl*, 42 Mo. 545; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Lawson*, Cont. § 327.

Among the potent reasons first assigned against such contracts was that the person restrained by thus surrendering his chosen occupation—one for which he had been especially prepared—might become a public charge, and the public be injured in being deprived of his personal skill in the avocation to which he had been brought up. Such reasons cannot be applied to artificial persons without absurdity. The substantial ground in all cases, especially where corporations are concerned, is that such contracts tend to create monopolies. In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded. [Quoting from *Match Co. v. Roeber* (N. Y. App.) 13 N. E. 422.]

Private corporations are subject to the control of the states from which they derive their charters. From an abuse or misuse or excess

of their powers, they can be called to an account by the state. It is better such control and regulation should be had by that ample authority than, indirectly, by a foreign forum, upon collateral questions of public expediency. The facts of this case disclose no tendency to monopoly. Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient. *Greene's Case*, 52 Fed. 104. [Again quoting from *Match Co. v. Roeber*, *supra*.]

! That the contract in this case was ineffectual to create a monopoly or even to confer a dominating control over the trade in bone tartar, is confessed to some extent by the answer, wherein it assumes, as a just reason for repudiating the contract, competition subsequently started. Acid phosphate of calcium is made by several processes. The plaintiff employed two—one from rock, and the other from bone. It leased the plant for making bone tartar only, reserving the other. The process was not discernible in the finished product. There is nothing in the contract from which we can reasonably infer a tendency to create a monopoly such as the law condemns. Even if an article be of prime necessity, the public is not concerned with who makes, but only with the reasonableness of, the price. But it is said that the defendant had, by its part in the transaction, such a purpose in view. This may be. The intent is only condemned as it is manifested in an unlawful act. If a person does a lawful act with a vicious intent, he is without the pale of legal punishment. Whatever may have been the defendant's motive, and even if reprehensible, there is no rule by which we may reprimand the plaintiff for the defendant's evil or wrongful intentions or acts. Whether the defendant's purpose is condemned by law or not does not affect the validity of the contract, unless plaintiff contributed something more to the accomplishment of the unlawful design than the mere leasing of its property. *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Tied. Sales*, § 294. But we are of the opinion that defendant has been hastily and unnecessarily self-accusing. The plaintiff was making inroads upon the defendant's business, and greatly cutting the prices of its sole manufactured product, while with the plaintiff this product was but a single feature of its manufacturing plant. The defendant had a perfect right to buy off the competition of a dangerous, powerful, and aggressive rival. The law of self-defense and protection applies to one's business, as well as to his person. But, if another springs up in the stead of the one silenced, the courts cannot, under the guise of public expedience, relieve him from the improvidence of his first contract.

Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests. Combinations in the nature of modern trusts, so soundly

condemned, are those which aim at a union of energy, capital, and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another. In the contract here we find none of the elements of a combination or trust. It is a simple lease and sale for a fair and reasonable compensation, with stipulations only commensurate with a reasonable necessary protection. The effect of the transaction, while not so literally expressed, was to convey with the premises the good will of the plaintiff in its bone tartar product and trade. It is both unnecessary and unprofitable to discuss the many cases cited in the briefs. Upon a topic of public expedience, adjudications are, seemingly, necessarily inharmonious.

Judgment for the plaintiff for the rent sued for, and 6 per cent. interest upon each installment from the date it became due.

CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY
PACKET CO. v. BAY.

(Supreme Court of the United States, 1906. 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428.)

Error to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Lawrence County, in that state, in favor of plaintiffs in an action to recover the purchase price of certain river craft, in which the defendant alleges that the contract of sale was illegal under the Federal antitrust act.

Mr. Justice HOLMES delivered the opinion of the court:

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the state, although the petition in error to that court set up that the contract was illegal under the Act of Congress July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. St. 1901, p. 3200. No opinion was delivered, but a certificate that this objection was relied upon, and that it necessarily was considered, was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure—a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the state. *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. Ed. 821, 23 Sup. Ct. 565.

The contract was an indenture between the Portsmouth & Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell

to the latter two steamers, two deck barges, two coal flats, and \$500 in the stock of the Coney Island Wharf Boat Company, for \$30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays \$3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last-mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal, as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the states.⁸¹

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose, then, that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract, and, so far as it is so, is shown to be

⁸¹ The discussion of this point is omitted.

valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the states. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last-mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone, but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale: Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute (*United States v. Trans-Missouri Freight Asso.*, 166 U. S. 290, 329, 41 L. Ed. 1007, 1023, 17 Sup. Ct. 540; *United States v. Joint Traffic Asso.*, 171 U. S. 505, 568, 43 L. Ed. 259, 287, 19 Sup. Ct. 25), and it was so decided in the case of a patent (*E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. Ed. 1058, 1069, 22 Sup. Ct. 747). It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for

that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 152, 201; *Pigot's Case*, 11 Coke, 26b, 27b. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any direct bearing on commerce with another state, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

CHAPTER III

CONTRACTS ACCOMPANYING THE PURCHASE OF
PROPERTY

OREGON STEAM NAV. CO. v. WINSOR.

(Supreme Court of the United States, 1873. 20 Wall. 64, 22 L. Ed. 315.)

Error to the Supreme Court of the Territory of Washington.

The Oregon Steam Navigation Company sued Winsor et al. in one of the courts of the territory of Washington, to recover \$75,000 as stipulated damages for the breach of a certain agreement between the parties. The complaint set forth the following facts: That in 1864, the California Steam Navigation Company being engaged in steam and other transportation on the several routes of travel on the rivers, bays, and waters of the state of California, sold to the plaintiff, the said Oregon Steam Navigation Company (being a company engaged in the like business on the Columbia river and its branches, in Oregon and Washington), the steamer *New World*, for \$75,000, subject to a stipulation, amongst other things, that the latter company should not run or employ, or suffer to be run or employed, the said steamer upon any of the routes of travel, rivers, bays, or waters of the state of California, for the period of ten years from the 1st day of May, 1864; that on the 18th day of February, 1867, the Oregon company sold the same steamer to Winsor and others for the sum of \$75,000, subject to a stipulation and covenant that she should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the state of California, or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867; and that for a breach of said covenant the vendees should pay \$75,000 as actual liquidated damages. The complaint further averred, that at the time of the second sale of the steamer, and up to the commencement of the suit, the California Steam Navigation Company were engaged with numerous steam and other vessels in navigating the waters of the state of California; and that the Oregon Company, the plaintiffs, were likewise engaged in the navigation of the Columbia river and its branches; and that at the time of said sale to the defendants, the latter were engaged in navigating the waters of Puget Sound, and were in no wise engaged in the navigation of the waters of Oregon or California, or of any of the waters described in the stipulation. The breach complained of was that the steamer had been engaged from the 1st of November, 1868, to the commencement of the suit, in the transportation of passengers and freight from the city of San Francisco to Vallejo, in the state of California, being a route of travel on the waters of the state of California embraced in the stipulation and covenant.

The complaint was demurred to, and the demurrer was sustained and the action dismissed. The plaintiff brought a writ of error to the Supreme Court of the territory, which affirmed the judgment and that judgment was now here on the present writ of error.

The sufficiency of the complaint was of course the matter brought up; and the case turned mainly upon the question, whether the covenant entered into by the defendants, whereby they agreed "not to run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel, or the rivers, bays, or waters of the state of California, or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867," etc., was valid. The objection urged against it was that it was a contract in restraint of trade, and as such contrary to public policy.

Mr. Justice BRADLEY delivered the opinion of the court.

It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

The application of the rule is more difficult than a clear understanding of it. In this country especially, where State lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular state is, or is not, within the rule. It has generally been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation.

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and

that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

To apply these principles to the case before us: The California Steam Navigation Company, being engaged in the business of transportation on the rivers, bays, and waters of California, was willing to sell

one of their steamers to the Oregon Steam Navigation Company, which was engaged in a similar business on the Columbia river and its tributaries, provided the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the 1st day of May, 1864. This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific Coast. Again, the Oregon company were afterwards willing to dispose of the same steamer to the defendants, who were engaged in the like business of transportation in the waters of Puget Sound, Washington Territory, provided that the latter would agree that the steamer should not be run or employed upon any of the routes of travel or rivers, bays, or waters of California, or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867. This stipulation excluded the steamer from the territory covered by the former stipulation exacted by the California company, and also from the territory occupied by the Oregon company itself. The latter portion of the stipulation stands on the same ground and reason as did the first stipulation between the California and Oregon companies. The former portion was necessary in order that the Oregon company might faithfully keep its covenant with the California company. It is true that the stipulation in question covers a period of time which extends three years beyond the period for which the Oregon company is bound to the California company. The latter would expire on the 1st of May, 1874, and the stipulation in question extends to the 1st of May, 1877. This extra period of three years, in reference to the waters of California, is not necessary to the protection of the Oregon company. That company is under no obligation with regard to those three years.

But the suit is brought and the breach is alleged for a portion of time during which the Oregon company is bound to protect the California company from the interference of said steamer. And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains

a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether."

The cases cited in support of this proposition are *Chesman et ux. v. Nainby*, 2 Strange, 739, *Wood v. Benson*, 2 Crompton & Jervis, 94, *Mallan v. May*, 11 Meeson & Welsby, 653, *Price v. Green*, 16, *Messon & Welsby*, 346, *Nicholls v. Stretton*, 10 Queen's Bench, 346. In *Price v. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls v. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in *Price v. Green*, held the contract divisible, and sustained the action.

We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it.

Regarding this objection, therefore, as removed, the covenant made by the defendant seems to stand on the same ground as that made by the plaintiffs with the California company. The same observations may be made with reference to it. The public was not injured by being deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid for the steamer; its object and purpose was simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection.

We are unable, therefore, to see anything in the contract, so far as it is now in question, which militates against public policy.

There are no other points adverted to which demand the serious consideration of the court.

Judgment reversed, and the case remanded to be proceeded in according to law.

Dissenting: Justices CLIFFORD, SWAYNE, and DAVIS.

BREWER v. MARSHALL and CHEESEMAN.

(Court of Errors and Appeals of New Jersey, 1868. 19 N. J. Eq. 537, 97 Am. Dec. 679.)

The injunction in this case restrains the defendant Marshall from selling or removing from the farm conveyed to him by the defendant Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction.

The defendant Cheeseman was, in 1841, seized of a farm in the county of Gloucester, known as the Swope farm, on which there were valuable beds of marl. On the 23d of February, in that year, he conveyed to James W. Lamb two tracts of that farm, one a tract of forty-eight acres, lying east of the Cross Keys road which divided the farm, and another of twelve and a half acres, lying west of the road, on Great Timber creek, and which, in the deed, is described as "twelve acres and a half of marl land." The deed grants a right of way over a strip twenty feet in width from the road to the creek along the marl lot, and contains, in the description of the premises after the description of the way, these words: "Also the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property."

On the 14th of December, in the same year, Lamb conveyed back to Cheeseman the forty-eight acre lot. On the 3d of January, 1842, Cheeseman conveyed to Lamb another part of the Swope farm, in two lots. One was a lot of seven acres adjoining the creek, and north of and adjoining the twelve and a half acre lot; the other was a strip of one acre, leading from the seven acre lot eastwardly to the road, and including the land over which the right of way had before been granted. On the same day Cheeseman executed to Lamb a bond in the penalty of \$5,000, secured by a mortgage on part of the Swope farm not conveyed. The conditions of the bond and mortgage (which were both in the same words), contained this recital: that Cheeseman, in consideration of \$1,650, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the Swope farm; that the principal value of said lot consisted in the valuable beds of marl upon it; that there were divers like beds of marl upon the residue of the Swope farm; that said sum was paid not only as the consideration for said lot, but upon the express agreement between the parties that neither Cheeseman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold, or removed from off the said farm, any part or parcel of the marl thereon, except for the use of the farm, "so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb"; and upon the further agreement that for any violation of said covenant

by the said Cheeseman, his heirs, executors, administrators, or assigns, or other persons holding said farm under him or them, said Cheeseman, his heirs, executors, or administrators, should pay to said Lamb, his heirs, executors, administrators, or assigns, the sum of \$500. The condition was, that if they did not so dig or sell, and if they paid up such penalties, the obligation and mortgage should be void.

On the 6th of September, 1842, Lamb conveyed back to Cheeseman the seven acre lot, except a triangular part containing about one-tenth of an acre, retained to give access from the one acre strip (used as a way) to the twelve and a half acre lot, this being the means of communication from that lot to the Cross Keys road. Lamb conveyed the twelve and a half acre lot, the one acre used for a way, and the tenth of an acre reserved from the seven acre lot, to the complainant Brewer, by two deeds, one dated March 3, 1847, the other dated January 3, 1848; the last deed conveyed the one acre used as a road, and the tenth of an acre reserved from the seven acre lot. And on the same day Lamb assigned to Brewer the bond and mortgage given to him by Cheeseman. Cheeseman, by four deeds made at different times, conveyed to the defendant Marshall the rest of the Swope farm not conveyed to Brewer.

Both the defendants have at different times dug, removed, and sold from the seven acre tract and other parts of the Swope farm, marl by the ton and measured quantity, since 1842; and the defendant Marshall was continuing to do so until the injunction.

These facts appear by the bill and are admitted by the answer.

The opinion of the Chancellor is reported in 18 N. J. Eq. 338.

The opinion of the court was delivered by

THE CHIEF JUSTICE.¹ * * * But, in the second place, it seems to me that this covenant, on which this suit rests, is illegal in itself, and absolutely void. The substance of this covenant is, that neither the former owner of these premises, nor his assigns, shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug up and used upon the land; but the restriction is on the sale of the marl after it shall have been dug up. Marl of course is an article of merchandise, and the covenant restrains traffic in that article. It prohibits the sale of it at any time, in any market, either by the owner of the lands or by his assigns. Now it seems to me that this is a plain contract "against trade and traffic, and bargaining and contracting between man and man." That it is the rule that all general restraints of trade are illegal, has never been doubted since the famous opinion of Lord Macclesfield, in *Mitchel v. Reynolds*, reported in 1 P. Wms. 181. And the development of this rule, and its application under a variety of conditions, can be traced in the series of decisions which have been care-

¹ There is omitted the part of the opinion in which it was held that the grantee took with notice, but that the covenant was not such as to be enforceable against a grantee, even in equity.

fully collected and intelligently commented on in the notes to the case just cited in 1 Smith's L. C. 182.

The reason upon which this rule is founded, is thus expressed by Mr. Justice Best, in *Homer v. Ashford*, 3 Bing. 326: "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." And so far has this principle been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other. *Horner v. Graves*, 7 Bing. 743. Tested by these principles, the covenant in question appears to be destitute of all the essentials of a legal agreement. The restraint it imposes is general, both as to time, place, and persons. It transcends, by far, the limits of utility to the covenantee. I cannot say that the covenant is legal, any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm, would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed, and is so well adapted, to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property. In this view, I am prepared to say that the complainant's case has no legal foundation.

In conclusion, I may say that I have not overlooked the claim of the appellant to restrict the use of the lands of the respondent by force of the covenant contained in the bond and mortgage of the date of the 23d of January, 1842. * * * It is to the effect that the marl from the lands of the covenantor shall not be sold so as to be brought into competition with the marl of the covenantee. It is obvious that under so broad a covenant as this, the covenantee could drive the covenantor from every accessible market in the country. I do not find any case which sanctions so broad a restriction. But it is not necessary to pursue this inquiry, for as this case is now presented the complainant is not in a position to ask the aid of this court with regard to this covenant embodied in the bond and mortgage. It will be observed that this agreement prohibits the selling of marl taken from the lands adjoining the seven acre tract, so as to bring such marl in competition with that to be derived from such tract. The appellant is now the owner of but a small part of this seven acre tract, and from which portion he has never taken any marl. If it be true then that the respondent has taken or intends to take marl from his property which adjoins the seven acre tract, such acts cannot be even technical breaches of the covenant now in question, for as the appellant has not worked that portion of the seven acre tract which still remains to him, it is

obvious that the prohibited competition has not occurred. In this respect, the appellant has not suffered, nor is he threatened with substantial loss, and, consequently, on this head has no standing in a court of equity.

On these grounds, I think the decree of the Chancellor should be affirmed, with costs.

The decree was affirmed by the following vote:

For affirmance—BEASLEY, C. J., BEDLE, DALRIMPLE, DEPUE, VAIL, VREDENBURGH, WALES, WOODHULL.

For reversal—CLEMENT, KENNEDY, OGDEN, OLDEN.

HODGE v. SLOAN.

(Court of Appeals of New York, 1887. 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.)

Appeal from General Term, Supreme Court, Third Department.

The original action in this case was begun by Edward Null against Richard Sloan to restrain the defendant from selling sand off of a parcel of land sold by plaintiff to the defendant's grantor, John D. Sloan. Judgment was entered for defendant upon an order which affirmed a judgment for defendant dismissing the complaint, entered upon a decision of the court at special term. After appeal to this court, the plaintiff died, and his executor, Augustus M. Hodge, was substituted as appellant. On the 9th day of May, 1868, Edward Null was the owner of certain land containing deposits of sand, the sale of which constituted his whole business. The land included about 40 acres, and upon being applied to by John D. Sloan for a portion of the land, about half an acre, he refused to sell, because by selling he would injure his business. Afterwards, upon Sloan's agreeing not to sell any sand off of the land, the plaintiff sold to him the portion of the land he wished. A contract of sale was made which contained such agreement, and, in fulfillment of the contract, a warranty deed was given from plaintiff to Sloan containing a covenant by the grantee "not to sell any sand off of said premises." The deed was received and duly recorded, and possession taken. Afterwards, Sloan conveyed to his son, the defendant, Richard Sloan, by deed containing no reference to the covenant in the deed from plaintiff; but defendant, at the time of taking the land, had full knowledge of the existence of the covenant. Against the protest of plaintiff, he opened a sand-pit, and proceeded to sell the sand therefrom. The court held that the covenant was void as against public policy, being in restraint of trade, and the complaint was dismissed.

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice; for it takes from one party an advantage which he refused to sell, and secures to the other, without price, a privilege which his grantor was unable to buy. Nor do we find that this denial

of private right is required by any rule of public policy. Assuming, with the respondent, that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it; or, in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of *Chappel v. Brockway*, 21 Wend. 157 and *Ross v. Sadgbeer*, Id. 166, derived by a learned court from the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (*Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, opinion by Andrews, J.) as to make any elaboration of the general rule quite superfluous. The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy, and which the plaintiff was willing to sell, provided it should not be made an instrument for the destruction of his means of livelihood, or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools or instruments or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him, upon a sale of the instrument, to consent to that use, or prohibits him from binding his vendee against it. We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way; and, in order to do this, it was necessary that he should preclude himself from so using it as that, by its means, he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right, with which the question of public policy has little if anything to do. Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee,

taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should, in equity at least, bind whoever takes title with notice of such covenant. By reason of it, the vendor received less for his land; and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor.²

The judgment appealed from should be reversed, and new trial granted, with costs to abide the event. All concur, except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting, because, in their opinion, the covenant was a personal one, and did not bind the grantee of the land. Judgment reversed.

WITTENBERG v. MOLLYNEAUX.

(Supreme Court of Nebraska, 1900. 60 Neb. 583, 83 N. W. 842.)

SULLIVAN, J. John T. Mollyneaux brought this action in the district court to recover damages of Marcus Wittenberg and his codefendants for breach of a covenant contained in a deed of conveyance. In June, 1889, the plaintiff was the owner of a hotel in the city of Sutton, and the defendants were at the same time the owners of another hotel in the same city. The parties agreed to exchange their properties, and the agreement was carried into execution. The conveyance made by Mollyneaux to the defendants provided that the premises therein described should not be used for hotel purposes for a period of two years. The petition alleges that this stipulation has been violated, and that the plaintiff has been damaged thereby. Issues were joined by the filing of an answer and reply. The cause was tried to a jury, and, there having been a verdict and judgment for the plaintiff, the defendants bring the record here for review, alleging error in the admission and exclusion of evidence, and in the giving and refusal of instructions.

Many of the rulings assigned for error assume that the covenant upon which the action is grounded is valid and enforceable. This position is resolutely assailed by counsel for the defendants. They contend that, there being only two hotels in Sutton, the closing of one would give the owner of the other a monopoly, and that such a result would be prejudicial to the interests of the traveling public, and contrary to the policy of the state. We think the restriction upon the use of defendants' property was not unlawful. Contracts which impose unreasonable restraints upon the exercise of any business, trade, or profession are said to contravene sound public policy; but partial restraints are not deemed to be unreasonable when they are ancillary

² A review of cases concerning the basis of the liability of a successor in title is omitted.

to an actual purchase of property, made in good faith; and are apparently necessary to afford fair protection to the purchaser. Although such agreements tend to suppress competition, and bring about conditions favorable to the creation of monopolies, they are in harmony with the policy of the state, which is to promote commerce by facilitating the sale and transfer of property. Of course, if it be shown that the main purpose of the agreement is to secure a monopoly, and that the purchase of the property was a mere incident or means to that end, it is within the rule applicable to ordinary combinations in restraint of trade, and will not be enforced. *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188.

The defendants in this case, notwithstanding the contract in question, were at liberty to engage in the hotel business at Sutton. So was any one else who might choose to do so. And the business might be established and carried on anywhere within the corporate limits except upon the premises formerly owned by Mollyneaux. Under these circumstances, it would seem that the public interests were not formidably threatened by the restrictive covenant, which was doubtless designed to secure to the plaintiff the patronage of his old customers. But the suggestion is made that when the case was first here it was intimated that the facts alleged in the answer would, if proven, constitute a good defense to the action. We are aware of the rule that forbids an appellate court to reconsider and correct, on a subsequent appeal of a cause, an erroneous decision made by it on a former appeal. *Ripp v. Hale*, 45 Neb. 567, 64 N. W. 454; *Coburn v. Watson*, 48 Neb. 257, 67 N. W. 171; *Association v. Kettenbach*, 55 Neb. 330, 75 N. W. 827; *Hayden v. Frederickson*, 59 Neb. 141, 80 N. W. 494; *Leavitt v. Bell*, 59 Neb. 595, 81 N. W. 614. The judgment rendered by this court when the cause was first here is, we conclude, a finality. It is the law of the case, an adjudication binding upon the parties, and settling definitively, for the purposes of the litigation, all questions adjudicated. This rule, however, does not apply to a mere expression of opinion in regard to matters not actually involved in the decision.

The only point determined in *Mollyneaux v. Wittenberg*, 39 Neb. 547, 58 N. W. 205, touching the agreement of the defendants, was that the district court erred in holding it to be unenforceable. The legal effect of the averments of the answer, except those relating to the waiver, was not considered by the court, and was not decided. Upon this branch of the case our conclusion is that the restrictive covenant was valid when made; that events subsequently arising could not, and

did not, render it invalid; and that, therefore, the trial court did not err in excluding evidence offered, and instructions requested, on the hypothesis that such covenant was null in its inception, or else became null by reason of the failure of Mollyneaux to furnish fair and reasonable entertainment to all comers.

We have not overlooked the contention of counsel that the public has a special interest in hotels, that they are affected with a public use, and that it is contrary to public policy to discontinue the operation of a business of this kind. The first answer to this argument is that the evidence does not show that the Oakland Hotel was in operation when the exchange of properties was effected, and consequently there is no proof that the contract made only one hotel to run where two were running before.

The second answer is that the right to run a hotel is not a franchise. An innkeeper is not clothed with any authority from the state, and he owes no duty to the public, except to render to all who come, and are fit to be received, fair accommodations, at fair prices, while he sees fit to remain in business. The doctrine established by such cases as *Railroad Co. v. Ryan*, 11 Kan. 451; *Woodman v. Innes*, 47 Kan. 26, 27 Pac. 125; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798; and *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600—is not applicable to property adapted to use as a hotel or actually used for that purpose.

It is said that the court erred in permitting Mollyneaux to testify to the fact that the Oakland Hotel, the one which he acquired by the exchange, was incumbered at the time the exchange was made. This evidence was offered for the purpose of showing that there was an adequate consideration for the covenant here in question. Such proof was unnecessary. It was immaterial, but we are not able to see that it was in the least degree prejudicial.³

There is no prejudicial error in the record, and the judgment is therefore affirmed. Affirmed.

³ So much of the opinion as deals with other assignments of error is omitted.

MERRIMAN v. COVER, DRAYTON & LEONARD.

(Supreme Court of Appeals of Virginia, 1905. 104 Va. 428, 51 S. E. 817.)

BUCHANAN, J.⁴ This is an action of covenant upon an agreement entered into by the defendants in error, as partners doing business under the firm name of Cover, Drayton & Leonard, and the plaintiff in error and another, doing business as partners under the firm name of E. B. Younken & Co.

The principal question involved in this writ of error is whether or not the contract sued on is in restraint of trade and contrary to public policy, and therefore void.

At the time of the execution of the contract, the plaintiffs, parties of the first part, were the owners of land in Giles county, near the mouth of Wolfe creek, upon which they had a tannery and were engaged in the manufacture of leather. Upon their premises was a railroad siding or track owned and controlled by them, which connected with a siding of the Norfolk & Western Railway, whose line passes through the plaintiffs' premises. The parties of the second part wished to build a railroad up Wolfe creek at least as far as their property, a distance of about six miles. In order to do this they deemed it advisable to get the right to build their road over the plaintiffs' premises, and to connect with and use the latter's siding, which connected with the Norfolk & Western Railway. In consideration of those rights which the contract sued on grants them, the parties of the second part, among other things, agreed "that no chestnut oak bark shall be shipped over their road, no matter how far it extends, except to the parties of the first part, unless the parties of the first part refuse to take the said bark at the market price." The declaration sets out the contract in full, the circumstances under which and the purposes for which it was entered into, the building of the road, and assigns as a breach thereof the failure and refusal of the defendants to deliver to the plaintiffs the chestnut oak bark shipped over their road during the season of 1902 as they had agreed to do.

The plaintiff in error, the only one of the parties of the second part upon whom process was served, demurred to the declaration. The action of the court in overruling his demurrer is assigned as error.

The grounds of demurrer chiefly relied on here, and which require special notice, are that the declaration, by setting out in full the contract sued on, shows on its face that it was *prima facie* illegal and void, in that it was a contract in restraint of trade and particularly against public policy; and second, that the averments of the declaration are not sufficient to exclude such presumption.

It is conceded by the plaintiff's counsel, as we understand their arguments, that if the parties of the second part had been an incorporat-

⁴ The statement of facts and parts of the opinion are omitted.

ed railway company the contract would be illegal, and that their action could not be maintained. * * *

Having reached the conclusion that the contract upon its face does not show that the road to be built was to be a common carrier for hire, is the restraint imposed upon the defendants by the contract contrary to public policy? * * *

The restraint in the contract under consideration is limited. It does not prevent the defendants from carrying on their business or abridge their rights in any respect, other than that no chestnut oak bark shall be shipped over their road, except to the plaintiffs, unless they refuse to pay the market price therefor at their own or any other large tannery in that county.. As between the parties such a restriction does not seem to be unreasonable. It would hardly be seriously insisted that a landowner who was operating a flouring mill upon his lands would not have the legal right, in granting another private individual a wagon way over his land, to make it a condition to the exercise of such right, and as a consideration therefor, that no wheat should be hauled over that wagon way except for the mill owner, unless he refused to take it at the market price. The fact that the right granted is for a steam railroad, where the parties are private individuals, does not affect the question.

Neither does the restriction injuriously affect the public. Before the contract was made the defendants had no right to haul anything over the plaintiffs' lands for sale to the public. By virtue of the contract they acquire the right to haul all commodities over it without restraint, except chestnut oak bark. If the contract has any effect upon the rights of the public, it enlarges rather than lessens them.

But if the contract on its face were *prima facie* an unreasonable restraint upon trade, the averments of the declaration as to the circumstances under which and the purposes for which it was entered into, if such averments can be considered, exclude that presumption. It is true, as argued, that averments of fact are not proper in a declaration which add to, vary, or otherwise alter the contract sued on, and that such averments are not admitted to be true by a demurrer to the declaration, since a demurrer only admits such facts as are well pleaded. *Jones v. Thomas*, 21 Grat. 96; *Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 899. But in determining whether or not a contract in restraint of trade is reasonable each case must be considered in the light of its own facts and circumstances. *Oregon Steam, etc., Co. v. Winsor*, *supra*. This being so, such facts and circumstances, in so far as they do not add to, vary, or otherwise alter the writing sued on, may be shown by proof, and it would seem to follow as a matter of course that they may be averred in the declaration.

In the case of *Ross v. Sadgbeer*, 21 Wend. 166, 168, it was said by the Court of Appeals of New York that, "although it does not appear on the face of the contract that there was good reason for making it,

the plaintiff may, I think, help out his case by proper averments in pleading. See *Mitchell v. Reynold*, 1 P. Wms. 181, *Homer v. Ashford*, 3 Bing. 322. Such averments will not contradict the deed, because that expresses no consideration whatever; and, if the special circumstances were such as will uphold the contract of the parties, I see no very good reason why the plaintiff should not be allowed to aver and prove them. The point seems never to have been directly adjudged, and perhaps we ought not to pass definitely upon it in a case where the question has not been discussed by counsel."

In *Richards v. Am. Desk, etc., Co.* (Wis.): 58 N. W. 787, it was held that a pleading would be bad on demurrer if it did not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This, said the Supreme Court of Wisconsin in that case, was in accord with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint.

Construing the contract in the light of the circumstances under which and the purposes for which it was executed, as averred in the declaration, we are of opinion that the demurrer to the declaration was properly overruled. * * *

As the judgment of the circuit court will have to be reversed, the verdict set aside, and a new trial granted because of erroneous instructions given, as heretofore pointed out, it will be unnecessary to consider the remaining assignments of error as to the refusal of the court to arrest the judgment and set aside the verdict for the reasons set out in the defendant's bills of exceptions Nos. 3 and 4.

Reversed.

HENSCHKE v. MOORE.

(Supreme Court of Pennsylvania, 1917. 257 Pa. 196, 101 Atl. 308, L. R. A. 1917F, 450.)

Bill in equity for an injunction by Bruno Henschke and Karl Ersel, copartners doing business under the name of Haensel & Co., against Edgar B. Moore and others. Injunction awarded, and defendants appeal.

POTTER, J. The form of the bill filed by complainants in this case indicates that they sought to restrain the infringement of certain letters patent of the United States granted to Oswald Hansel for an improvement in apparatus for feeding horsehair from a bundle to a wrapping device. If that were in fact the issue involved, we would be without jurisdiction to determine it, as the infringement of a patent is a question exclusively for consideration by the federal courts. The real controversy here turned, however, upon the force of a contract entered into concerning the use to be made of certain machines embodying the said invention, and no rights are involved except such as arise out of the contract.

It appears that on February 21, 1913, Haensel & Co., the plaintiffs, entered into a written contract with the defendant Edgar B. Moore, "acting for himself and his undisclosed associates," whereby they granted to the said defendant, in consideration of his agreement to pay certain royalties, the sole and exclusive right to manufacture and use "an apparatus for feeding horsehair from a bundle to a wrapping device," which was protected by letters patent of the United States owned by plaintiffs. Provision was made for the cancellation or surrender of the license under certain circumstances, with a stipulation that in the event of cancellation or surrender "the licensee will not thereafter, either directly or indirectly, engage in the business of manufacturing or selling the same or any competing material in the United States." This statement is not clear. The license was for the use of a machine, and the language would naturally imply an engagement not to manufacture or sell any such machines, but it is conceded that what was intended was an engagement not to manufacture or sell horsehair yarn or thread similar to the product of the machine, or which would compete therewith. As thus understood, we have, then, a contract for a license to manufacture and use a machine, with a provision that, in case of surrender of the license, the licensee shall be prohibited from making or selling, not the machines which were protected by the patent, but any horsehair yarn which would compete with the product of the machine. The court below held that complainants were entitled to the relief they sought. Exceptions were dismissed, and a final decree entered by which the defendants were enjoined "until the 7th day of March, A. D. 1928 (the expiration of the patent), from making or selling, directly or indirectly, endless horsehair yarn or cloth made therefrom similar to that under the patent of the complainants, as set forth in the bill of complainants filed in this cause, and the manufacture and sale of any competing endless hair yarn and cloth made therefrom." An accounting for profits arising out of the manufacture and sale of hair yarn or cloth made therefrom since September 30, 1914, was also ordered. Defendants have appealed, and their counsel contend that the covenant by which the licensee was bound, in the event of the surrender of the license, not to manufacture or sell anywhere in the United States at any time material similar to that which was the product of the machine described in the patent was a contract in restraint of trade, which a court of equity will not enforce. * * *

Our Pennsylvania cases follow the distinction between contracts in general restraint of trade and those in partial restraint. In the former case we have held the restriction to be void, and in the latter that it might be sustained if reasonable. The decision in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088, 105 Am. St. Rep. 812, 2 Ann. Cas. 951, was cited by the court below, and is relied upon by both parties to this appeal, as defining the present state of the law upon the subject. It was there said (210 Pa. page

302, 59 Atl. page 1093 [105 Am. St. Rep. 812, 2 Ann. Cas. 951]): "When a contract is presented which in some degree restrains trade, we do not at once decide that it is void as against public policy, but we go further and inquire, is it limited as to space or time, and is it reasonable in its nature?"

Mr. Justice Dean then called attention to the facts that the contract there under consideration was limited as to time, ten years, limited as to space, the immediate territory adjacent to three navigable rivers, and their tributaries, and related to the sale of the good will of a business. He expressly gave as one reason for enforcing the contract that "the time was not an indefinite period as in some of the cases."

In the case at bar the complainants do not expressly aver a breach of the covenant contained in the seventh paragraph of the contract, in which the licensee agrees that in the event of the surrender of the license he will not "engage in the business of selling the same or any competing material in the United States." The only sentence in the bill that can be construed to refer to that covenant is the averment that "respondents are continuing to take orders for and are manufacturing and have delivered large quantities of cloth containing said hair yarn of the exact appearance as that made and sold heretofore by respondents under your orator's patent." Yet the court below, without reference to the prayers of the bill that infringement of plaintiffs' patent be restrained, and for an account and award of damages for such infringement, has considered the bill as if it had been filed to enforce the contract not to manufacture and sell material similar to that which was to be produced on the machine described in the patent. The licensee was entirely within his rights in surrendering the license. The testimony shows that the machines described in the complainants' patent would not produce hair yarn which was satisfactory to defendants. That being the case, was the restriction reasonable which prevented the licensee from making hair yarn upon some other machine, after surrendering his license under complainants' patent?

We are clearly of the opinion that it was not. Hair yarn, and hair cloth made therefrom, were at the time old and well-known products long in public use. The license granted by complainants was merely for the use of a machine, and it did not apply at all to the hair yarn which was the product of the machine. The license covered only one method of making hair yarn. Other methods which did not infringe the claims of the patent were open to the public. For the use which was made of the machine complainants were compensated by the royalty. When the license was surrendered, complainants received everything to which they were entitled. They had their patent then in their own hands and could use it themselves, or license others to use it. There was nothing to justify them in seeking to restrain defendants from engaging in the business of manufacturing hair yarn by the use of any machine which did not infringe their patent. This transaction

is not properly to be compared with the sale of a business in which there is an agreement upon the part of the seller not to compete with the purchaser for a limited term. To do so in such a case would be a breach of faith, as it would depreciate the value of the property or business sold.

A case analogous to the present one would be that of the sale of a business in consideration of the payment of a yearly sum as compensation, coupled with a provision that, in case the purchaser exercised his right to discontinue the business, he should never be allowed to engage in the same or a similar business at any time or any place. Such a contract in restraint of trade would be clearly unreasonable. So in the present case is the attempt to restrain defendants from doing something which they were at perfect liberty to do before the granting of the license, that is, manufacture hair yarn by the use of a machine which does not infringe plaintiffs' patent. Any restriction which prevents them from doing the same thing after the surrender of the license which they in common with the public were at liberty to do before taking a license for the use of plaintiffs' machine is palpably unreasonable. Such a requirement is not at all necessary for the proper protection of the rights of the plaintiffs, and it is oppressive to defendants.

The restriction here is also unreasonable in that it is unlimited as to time. The court below endeavored to overcome this fault by enjoining defendants only during the balance of the term of plaintiffs' patent. But here again we must repeat that the patent, which was for a machine, did not apply to the subject-matter of the restriction, which was the manufacture and sale of hair yarn. The only thing to which plaintiffs had a right to protection was the subject-matter of their patent, and when the restriction went beyond that, and attempted to restrain defendants from engaging in the manufacture and sale of haircloth, a business which had been previously open to them in common with the general public, the restraint was unreasonable. * * *

In the case at bar the contract in restraint of trade, being unlimited as to time, and as to space extending over the entire country, must be regarded as extending the restraint further than is necessary for the reasonable protection of the covenantee. Reference to the nature and subject-matter of the restriction makes its unreasonableness more clearly apparent. As we have already indicated, payment of the royalty was full compensation for the use of the patent, and as the plaintiffs contributed nothing but the patent, there was no consideration whatever to support that portion of the agreement which bound the licensee after the surrender of the license to refrain from the manufacture, by methods which did not infringe plaintiffs' patent, of an article of commerce in common use. Such a restriction upon the rights of the licensee was in its very nature unreasonable and void.

Nor is there any merit in the suggestion that plaintiffs were entitled to relief in order to protect trade secrets. The contract had no re-

lation in any way to trade secrets. It related solely to the use of a patented machine, the specifications of which are a matter of public knowledge and record. To secure a valid patent, the law requires the specification to be plain and clear, and to describe the invention in such a manner as to enable the public to practice it from the specification alone. There was therefore no room in this case for the addition of any trade secrets to make the alleged invention workable.

Holding, as we do, that the contract in question is an illegal restraint of trade, and cannot be enforced in a court of equity, the question whether the relief sought should be confined to the single defendant Edgar B. Moore need not be considered.

Of the forty-four assignments of error, all except the last one are to the dismissal of various exceptions filed by defendants to the findings of fact and conclusions of law of the trial judge. Without disposing specifically of these assignments, it is sufficient to say that the forty-fourth, which is to the final decree, is sustained, and the decree of the court below is reversed, at the cost of the appellees.⁵

⁵ Some quotations from authorities are omitted.

CHAPTER IV

CONTRACTS INSTRUMENTAL IN APPORTIONING
BUSINESS

LESLIE v. LORILLARD.

(Court of Appeals of New York, 1888. 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.)

Appeal from Supreme Court, General Term, Second Department. Demurrer to complaint by defendants Lorillard and the Lorillard Steamship Company. The plaintiff is a stockholder of the defendant the Old Dominion Steamship Company of Delaware. In the year 1873 the Old Dominion Steamship Company of New York was a corporation organized under the laws of New York, and was engaged in the business of running a line of steamships between the port of New York and certain ports in the state of Virginia. The defendant the Lorillard Steamship Company was also a New York corporation, organized for the business of navigating the ocean by steamships. The defendant Lorillard was a director and the president of the Lorillard company, and had entire control of it; the other directors, except one, who was a brother-in-law, being his clerks and employés.

The complaint charges that in and prior to the summer of 1873 said Lorillard, "for the purpose of extorting large sums of money from the Old Dominion Steamship Company of New York, stated to the officers of said corporation that the said Lorillard Steamship Company intended to put on and run a line of steamships between the ports above mentioned, in opposition to the steamships of said Old Dominion Steamship Company; and, to deceive the officers of said company, and cause them to believe that a formidable opposition would be established against said company, said Lorillard caused said Lorillard Steamship Company to lease docks at Norfolk and other places, and to hire agents and servants at different points, and, in or about the month of October, 1873, said Lorillard caused said Lorillard Steamship Company to put on and run a line of steamships between said ports in opposition to said Old Dominion Steamship Company of New York"; that said Lorillard continued to run his steamships at great loss, and at his own expense, until his efforts were successful in deceiving the officers of the Old Dominion Company into the belief that a powerful opposition line had been established; and in January, 1874, an agreement running between the Old Dominion Company and Lorillard and his company was signed by the president of each company, and by Lorillard for himself, by the terms of which, in consideration of a monthly payment to him, Lorillard and his company agreed to discontinue running their vessels, or any others, between the ports mentioned, and that they would not charter or sell

the vessels to any other company or persons to be used on that route, and would not become in any way interested in the running of steamships between those places; that in February, 1875, the defendant the Old Dominion Steamship Company of Delaware was formed under the laws of that state, and succeeded to the business of the New York company, and "became vested with the property of said last-named company, which was duly conveyed and assigned to it, and subjected to the liabilities and contracts of said company"; that this new company continued making payments to Lorillard under the contract mentioned until February, 1878, when disputes arose between the various parties, and a new contract was entered into in October, 1878; that by this latter contract the previous contract was canceled, and, in consideration of the payment of a gross sum of money, and of certain monthly payments, to be continued through five years from February, 1879, Lorillard and his company again agreed not to run or to be in any way interested in the running of steamships between the ports named; that the Delaware Company made all the payments called for under the second agreement up to August, 1881, when further payment of the monthly subsidies was enjoined in an action brought by this plaintiff.

Plaintiff alleges that prior to the commencement of this action, and in February, 1884, he requested the Delaware Steamship Company to pay no more moneys, and to commence an action for the cancellation of the contract, and for the recovery back of the moneys paid under the contracts. This demand was in a letter, and the reply to it contains a resolution of the board of directors refusing to take the action requested. Plaintiff also alleges the commencement of an action in February, 1884, by Lorillard against the Delaware Company to recover the monthly payments payable under the contract from and after August, 1881, and that the Delaware Company did not intend to defend it. The relief demanded is an injunction against the Delaware Company's making any payments under the contract, against Lorillard from prosecuting his action, the cancellation of the contract, and the repayment by Lorillard of all moneys received. The demurrer having been overruled at Special Term, and its decision having been affirmed at general term, defendants Lorillard and the Lorillard Steamship Company appealed to this court.

GRAY, J. The defendants Lorillard and the Lorillard Steamship Company have demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. We are thus required to examine this pleading, and to see whether, allowing to its averments all the force and truth such a ground of demurrer concedes, it may be sustained as the foundation of an action for equitable relief. Our decision of the question will necessarily turn upon the validity of the contracts which are set forth.¹

¹The discussion of the doctrine of corporate powers is omitted.

Testing the case made by plaintiff in his complaint, in approaching the consideration of that pleading, we find that the only respect in which the contracts in question could be viewed as prejudicial to public interests, and therefore become the subject of judicial condemnation as against public policy, would be that they were in restraint of competition, and tended to create a monopoly. The tendency of modern thought and of the decisions, however, has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications. This change was gradual, and may be considered, perhaps, as due mainly to the growth and spread of the industrial activities of the world, and to enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies. The earlier doctrine, of course, obtained in respect of agreements between individuals. The limitation which became imposed was that the agreement should operate as to a locality and not as to the whole land. In later times the danger in such agreements seems only really to exist when corporations are parties to them; for their means and strength would better enable them to buy off rivalry, and to create monopolies. The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor; it was to guard society, of which he was a member, from the injurious consequences of his agreement, whether they would arise from his own improvidence in bargaining away his means of gaining a livelihood, or in the deprivation to society of the advantages of competition in skilled labor.

At the present day there is not that danger, or at least it does not seem to exist to an appreciable extent, except, possibly, as suggested, in the case of corporations. In their supervision and in their restriction within the limits of their chartered powers the government and the public are directly interested. Corporations are great engines for the promotion of the public convenience, and for the development of public wealth, and so long as they are conducted for the purposes for which organized they are a public benefit; but if allowed to engage without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection. Where, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection, and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the wel-

fare of the public. The doctrine relating to contracts in restraint of trade has been elaborately discussed in a careful opinion of Andrews, J., in the recent case of *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419. Under the authority of that case it may be said that no contracts are void, as being in general restraint of trade, where they operate simply to prevent a party from engaging or competing in the same business. It is there said (106 N. Y. 483, 13 N. E. 422): "To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges."

Under the doctrine of that case it is difficult to see how these contracts which are complained of here are open to the objection suggested by counsel. Regarded only in the light of what they tended to effect, these agreements removed a business rival, whose competition may have been deemed dangerous to the success or maintenance of the business of the Old Dominion Company. They could not, of course, exclude all competition in the business, but could in that particular case. How, then, is the result different from the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land? The doctrine held by this court in *Match Co. v. Roeber*, supra, should control in the case at bar, and these contracts, therefore, cannot be considered objectionable on the ground that they restrained competition. Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil. The conclusion at which we have arrived as to these contracts would seem to dispose of this case, and make further consideration useless, for the plaintiff makes them the basis of his action. The relief he has sought is the prevention of a misappropriation of corporate funds by the officers of the company, and the annulment of these contracts as obtained by deception.²

The interlocutory judgment overruling the demurrer should be reversed, the demurrer sustained, and the complaint dismissed, with costs. All concur, except RUGER, C. J., not voting.

² The discussion of a stockholder's power to prevent the diversion of corporate assets is omitted.

CLEMONS v. MEADOWS.

(Court of Appeals of Kentucky, 1906. 123 Ky. 178, 94 S. W. 13, 6 L. R. A. [N. S.] 847, 124 Am. St. Rep. 339.)

PAYNTER, J. This action was instituted upon a writing which reads as follows: "This agreement entered into this 12th day of July, 1904, by and between W. W. Meadows, of the New Meadows Hotel, and Clemons & Wade Bros., of the Usona Hotel, both of Fulton, Ky., witnesseth: That for a period of three years from date hereof W. W. Meadows, who agrees to close and keep closed his hotel, known as the 'New Meadows Hotel,' reserving to himself the right to rent the same for offices of all kind and description, and also to all roomers for one week or more, when opportunity may occur. That for and in consideration of the aforesaid elimination of the New Meadows Hotel as a factor in the hotel situation for the time named, of Fulton, Ky., Clemons & Wade Bros. agree to pay in advance to W. W. Meadows one hundred dollars cash, and one hundred dollars additional on the 12th day of each succeeding month for three years from this date. It is agreed by both parties that, should any rush of patronage greater than the Usona Hotel can accommodate occur, W. W. Meadows agrees to entertain, for lodging only, any and all guests sent to him by Clemons & Wade Bros., and to receive therefor as compensation 50 per cent. of any revenue derived therefrom. It is further agreed that the price for said lodging shall never be less than \$1 per person. However, it is agreed and understood that absence from home or any other good reason shall be sufficient and good reason for W. W. Meadows declining to take such guest. All rooms occupied by guests at the New Meadows Hotel to be cared for by W. W. Meadows."

✓The appellants claim that the contract is not enforceable, and that they cannot be required to pay the sums of money therein stipulated to be paid, because the contract is against public policy and without consideration. ✓It is averred in the answer that at the time of the execution of the contract Fulton was a town of 5,000 inhabitants; that it was situated at the crossing of the Illinois Central Railroad, running from Chicago to New Orleans and from Louisville to Memphis and New Orleans; that it was the headquarters of the Kentucky & Tennessee Division of the road, and a large number of local and transient persons stopped at the hotels for meals and lodging; that the New Meadows and Usona Hotels were first-class hotels, and were the only hotels of that class in the town; that they were rivals and competitors; that there was no consideration for the execution of the contract, except that which is stipulated therein; that it was entered into between the parties for the purpose of removing competition that existed in the hotel business in Fulton, and for the purpose of giving the Usona Hotel a monopoly of the hotel business of its class; and that the contract is against public policy. ✓The court sustained a demurrer

to the answer, and, the appellants failing to plead further, judgment was rendered against them.✓

So far as we are aware, the exact question presented by this record has never been decided by this court. This court has upheld contracts which were in partial restraint of trade. *Pyke v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Grundy v. Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; *Warehouse Co. v. Hobson*, 29 S. W. 308, 16 Ky. Law Rep. 869. It was said in *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274: "Indeed, a particular trade may be permitted by being limited for a short period to a few persons, and the public benefited by preventing too many from engaging in the same calling at the same place. If, therefore, the limitation be a reasonable one, it will be upheld." Beach on Contracts, § 1575, announces the rule as follows: "The modern doctrine is well-nigh universal that when one engaged in any occupation sells out his stock in trade and good will, or his professional practice, he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named, and he may be enjoined from violating this contract. This is about as far as contracts in restraint of trade have been upheld by the American courts, or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business, when made between vendor and purchaser and will uphold them, it does not treat them with any special indulgence."

The cases in which this and other courts have recognized this rule as correct, are where parties sell their business or trade, together with good will. For instance, cases where a merchant sells to his partner, or to a stranger, or where one being a professional man, with an established business as a physician or dentist, sells it, and as part of the consideration the vendor agrees not to engage in the business for a time, in that locality, and in such cases the courts have sustained such a contract, although they be in partial restraint of trade. Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must be more extensive than is reasonably necessary for the protection of the vendee, in the enjoyment of the business which he has purchased. In this class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued and thus perhaps throw out of employment those whose services were necessary to carry on the business, but on the contrary, it is contemplated that the business will be carried on and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriv-

ing the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been transferred to another. Such contracts do not have the effect of destroying the competition which existed by reason of which the public enjoyed benefits. From the terms of the contract and the averments of the answer it is perfectly manifest that the purpose of entering into the contract was to eliminate the New Meadows Hotel from the hotel business in Fulton, and prevent competition between it and the Usona Hotel conducted by the appellants, and to give to the latter a monopoly of the hotel business of the class to which these hotels belong. They were the only first-class hotels in town, and the effect of the contract was to enable the Usona Hotel to serve all the patrons whose tastes and financial condition induce them to stop at first-class hotels.

The question for our solution is: ✓Is the contract against public policy and without consideration ✓Hotels are established and maintained for the purpose of serving the public. The opening of a hotel is an invitation to the public to become its guests. Hotels are not conducted for the social enjoyment of the owners, but for the convenience of the public, that is, those whose business or pleasure may render it necessary that they shall ask and receive food and shelter at a place of public entertainment for compensation. ✓A hotel is a quasi public institution. ✓Those who desire to conduct a hotel must first obtain a license from the commonwealth allowing them to do so. Laws have been enacted for the purpose of protecting the proprietors of hotels because of the public character of the business. It is the duty of hotel proprietors to receive guests of good character, well demeaned and who are free from any contagious or infectious disease, and who have the financial ability to pay the charges. When a hotel agrees not to perform a duty imposed upon them by law, and agrees not to serve the public with a view of giving a competitor in business a monopoly of the hotel business, its act is in contravention of a sound public policy.

The contract relied upon in this case is plainly in restraint of trade, the only consideration being the payment of money for such an agreement. No property is sold or good will transferred. The business is destroyed, not continued for the benefit of the public. The laborers that were necessary to run the hotel are thrown out of employment, and the public is deprived of the benefits which would accrue should the competition continue. The contract was not for the purpose of protecting the appellants in the legitimate use of something, which they acquired by it, for, nothing was conveyed to them. ✓The purpose and effect of the contract was to enable the appellants to enjoy an illegitimate use of something which they already had. ✓Our conclusion is that the contract is against public policy and the demurrer to the answer should have been overruled. ✓Chapin v. Brown (Iowa) 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; Clark v. Needham (Mich.) 51 L. R. A. 785, 84 Am. St. Rep. 559; Tuscaloosa Ice Mfg. Co. v. Wil-

liams (Ala.) 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.³

The judgment is reversed for proceedings consistent with this opinion.

OLIVER v. GILMORE.

(Circuit Court of the United States, 1892. 52 Fed. 562.)

At Law. Action by Henry W. Oliver and others, constituting the firm of Oliver Bros. & Phillips, against Edwin W. Gilmore upon a contract. On demurrer to the declaration.

The contract in question, marked "Exhibit A," was as follows:

"Memorandum of agreement made and concluded this fifteenth day of February, (1883,) eighteen hundred and eighty-three, by and between Oliver Bros. & Phillips, party of the first part, and the Stanley Works, a corporation of the state of Connecticut, Roy & Co., a corporation of the state of New York, E. W. Gilmore & Co., of North Easton, Mass., C. Hager & Son, of St. Louis, Mo., McKinney Manufacturing Company, of Allegheny, Pa., the Peck, Stowe & Wilcox Company, a corporation of Cleveland, Ohio, and elsewhere, the Ætna Nut Company, a corporation of the state of Connecticut, and Sargent & Co., a corporation of the state of Connecticut and of New York, parties of the second part, witnesseth: That the said party of the first part agrees that the works, factory, and machinery owned, leased, and controlled by them, situate in Pittsburgh or elsewhere, shall not be operated or used by any person whatever for the manufacture of strap and T hinges (it being understood that the said Oliver Bros. & Phillips may use any machinery other than their regular strap and T hinge machinery for the manufacture of wrought-iron butts) for and during the period of five (5) years from and after the first day of March, (1883,) eighteen hundred and eighty-three. In consideration whereof, the said parties of the second part severally agree to pay to the said party of the first part, from and after the first day of March, 1883, a sum of money equal to three and one half per centum of the net sales of strap and T hinges, sold by the several parties of the second part during the month of March, 1883, and for each succeeding month during the period of this agreement. * * * It is further agreed that, should either of said second parties fail to make report of sales and pay over the per centum thereon contemplated by the terms of this agreement at the times herein designated, to said first party, notice of such failure shall be forthwith mailed to each of said second parties, and if within thirty days after the mailing of such notice the terms of this agreement are not complied with by the corporation or firm so in default, or in case of failure by the defaulting party, then, by the association of strap and

³ A quotation from the last case cited is omitted.

T hinge manufacturers, this agreement shall, at the option of said first party, be no longer in force, and the first parties shall be at liberty to resume the manufacture of hinges the same as if this agreement had not been made. It is also agreed that if any one of the parties of the second part should build, buy, or place in their works any additional machinery, which will in any way increase their present facilities for the manufacture of strap and T hinges, this agreement shall thenceforth be null and void. In witness whereof the said Stanley Works, the said Roy & Co., the said E. W. Gilmore & Co., the said C. Hager & Son, the said McKinney Manufacturing Company, the said Peck, Stowe & Wilcox Company, the said Ætna Nut Company, and the said Sargent & Co., have affixed their names and official signatures. This agreement to be void and of no effect unless signed and agreed to by all the parties named in the body of this agreement; but, if so signed by all, to remain in force until the expiration of the time specified in this agreement.

"Oliver Bros. & Phillips.

Peck, Stowe & Wilcox Co.,

"The Stanley Works,

By R. A. Neal, President.

"Wm. H. Hart, Treasurer.

Ætna Nut Co.,

"Roy & Company.

By R. A. Neal, President.

"E. W. Gilmore & Co.

Sargent & Co.,

"C. Hager & Son:

J. B. Sargent, President."

"McKinney Mfg. Co.,

"Wm. S. McKinney, President.

The declaration was in two counts,⁴ as follows:

"First Count. The plaintiffs say the defendant made a contract with them, a copy of which is hereto annexed, marked 'A,' whereby, in consideration of the agreements therein made by the plaintiff, the defendant promised to pay to the plaintiffs, on or before the fifteenth day of each month, except January, in the year 1887, a sum of money equal to three and one half per cent. of the net sales of strap and T hinges made by him during the month preceding, and the defendant further promised to make a report of said sales, signed and sworn to, as provided in said agreement, and send the same to the Wheeling Hinge Company; and the plaintiffs have done all things which they agreed to do in said contract. And the plaintiffs say that three and one half per centum of the net sales made by the defendant during the first eleven months of 1887 amounted to the sum of three thousand dollars during each of said months, but the defendant has neglected and refused to pay said sum of three thousand dollars, and has neglected and refused to make reports as aforesaid, though demand was made upon him so to do on the fifteenth day of each of said months; wherefore the defendant owes the plaintiffs said sum of three thousand dollars, and interest thereon from each of said fifteenth days.

⁴ A part of the agreement and the second count, with the court's consideration thereof, are omitted.

PUTNAM, Circuit Judge.⁵ The proposition of the plaintiffs that, as they had fully performed, the defendant is liable, even if the contract could not be enforced while it was executory on both parts, is not sufficiently sustained by the authorities cited by them, and is controverted by *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299; *Arnot v. Coal Co.*, 68 N. Y. 558; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; and *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. Also, the plaintiffs' proposition that what is sought to be accomplished by this contract indirectly might have been, under the law, accomplished directly, by the defendant's purchasing the works and closing them, does not aid us in coming to a conclusion in this case. There are many matters which the law cannot prevent, but which it refuses to aid when in an executory form. This is singularly illustrated by many of the expressions in the *House of Lords in Steamship Co. v. McGregor*, [1892] App. Cas. 25. Also the decisions quite uniformly recognize the distinction, in actions for the price of manufacturing plants sold, between cases where the vendor merely has knowledge of the purpose of the purchaser to create a monopoly, and those where the vendor becomes an active participant in that purpose.

If we were to accept the law without modification, as one branch of it was left by the Court of King's Bench in *Mitchel v. Reynolds*, 1 P. Wms. 181 (A. D. 1711), and as the other was stated in 4 Bl. Comm. pp. 156-159, concerning forestalling and engrossing, there would seem to be no doubt that the demurrer would necessarily be sustained. So far as the latter branch is concerned, the contract would seem to be in violation of the old rules of the common law, intended to prevent the gathering up of the control of commodities into few hands; and, as to the former, while *Mitchel v. Reynolds*, was that of an individual excluding himself from pursuing his occupation, yet there can be no difference in principle or practical application between shutting out a person and shutting out a manufacturing plant or establishment. Indeed, the latter would much more probably tend to the detriment of public and private interests than the former, and on a much larger scale. In such instances, not only does an individual operative suffer the personal injury against which *Mitchel v. Reynolds*, was aimed, but the public receives detriment through a destruction of values and a depopulation extending through entire towns or villages.

We must, however, take cognizance of the fact that the rules formerly laid down touching this topic are not now to be regarded as inflexible, and have been considerably modified. *Gibbs v. Gas Co.*, *ubi supra*, 409, and *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. 658. This has, perhaps, been the result of the pressure of the tremendous advances made by the vast extensions and rapidly increasing complica-

⁵ A part of the court's review of the authorities and the discussion of certain minor questions are omitted.

tions of modern business and manufacturing affairs, and of an apparent inability of perceiving how the old, strict rules can be applied judicially to the present conditions without laying down propositions which might in their application check enterprise, or interfere with freedom of trade. The departure in this direction by the judiciary and by legislation have been even more marked in Great Britain than in the United States. This will be seen, so far as the courts are concerned, from striking expressions in some of the English cases which we will cite, especially by the result in *Collins v. Locke*, L. R. 4 App. Cas. 674, and by many things said in *Steamship Co. v. McGregor*, supra, in the House of Lords, by Lord Coleridge (21 Q. B. Div. 544), and in the Court of Appeal (23 Q. B. Div. 598). While in the United States there is a tendency to revive, with the aid of legislation, the strict rules of the common law against all forms of monopoly or engrossing, the legislation of Great Britain has had a different tendency.

This [case] relates solely to the question whether a contract is against public policy, in which, for a merely pecuniary consideration, a manufacturer agrees to close his works entirely, or in part, for a specified number of years, in the case at bar made all the more characteristic in consequence of the counter stipulation that, if either of the other parties to the agreement should extend his works, the contract should become void. The defendant maintains that there is a lack of legal consideration for his promise. We presume he does not mean by this that a contract which may in some senses operate in restraint of trade, is invalid simply because the only consideration which the promisor receives is a pecuniary one. In *Navigation Co. v. Winsor*, ubi supra (20 Wall. 64, 22 L. Ed. 315), this was the only consideration; yet the court sustained the contract, observing that the stipulation objected to "was presumed to be founded on a valuable consideration in its influence on the price paid for the steamer." The cases are full of observations to the effect that the courts maintain these contracts under reasonable circumstances, principally because it is through them only that parties who have built up by honest industry a trade with a valuable good will, can secure an equivalent for the latter. The suggestion of the defendant on this point, however, leads directly to a proposition which seems to open a path through this case.

It will be observed that, although the suggestion of the defendant that a mere pecuniary consideration is not sufficient to sustain these contracts cannot be taken without qualification, yet this class of agreements is so different from ordinary ones that no action can be maintained on one of them, because it is under seal, without some reasonable consideration is shown. What is this reasonable consideration? Ordinarily, it is that when the covenantor surrenders his trade or profession an equivalent is given to the public; because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accom-

plished. The same occupation continues; the same number of mouths are fed.

Navigation Co. v. Winsor (20 Wall. 64, 22 L. Ed. 315) laid down very satisfactorily the reasons supporting this branch of the law, stating that one is the injury to the public by being deprived of the restricted party's industry, and the other the injury to the party himself by being precluded from pursuing his occupation, and being thus prevented from supporting himself and his family. It seems to the court that the case at bar is subject to both of the objections stated, without any proper compensatory consideration. The court also thinks that, in lieu of having "no tendency to destroy the usefulness" of property, or "to deprive the country of any industrial agency," or to require "transfers of residence or allegiance," or "the cessation or diminution of business," it is in all these respects directly the reverse.

Some of the decisions observe that contracts are presumably invalid^V which prevent a manufacturer from operating his works for a considerable period of time as he may deem his own interests or those of the public require; and the court finds nowhere any modification of the old rules which relieves the case at bar from this objectionable feature. It is not intended by this to say, whether or not, in an emergency of an overstock, manufacturers or miners may stipulate for handling their works or mines in a specific manner, or for shutting them down in whole or in part, each for such limited time as would ordinarily enable a congested market to relieve itself; but a contract extending over^V a period of five years, intended, like this at bar, for restricting production, and absolutely binding manufacturers and dealers, while still retaining their plants and establishments, to operate them in a particular way, or to shut them down in whole or in part, is such an incumbrance on the freedom of individual action, necessary to the public good, as to be invalid.

Therefore, in view of the fact that by this contract plaintiffs stipulate to shut down their works, at least so far as strap and T hinges are concerned, for the long period of five years, for no consideration except a pecuniary one, and without a lawful equivalent with reference to the continuance of manufacturing, or its development, in other directions, and also in view of the other fact, that this contract is especially marked by the further stipulation that it shall be void if the other parties to it increase their existing facilities, the court holds that, as the case stands, the demurrer must be sustained as to both counts. The expression of the Supreme Court in *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. 553, repeated in *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, that "the question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable," must, however, be regarded. The court will not presume to define, in advance of the facts which may be shown, or perhaps to define at all, what may be the

practical effect of these expressions; but, being warned by them, it cannot determine on this demurrer that it is impossible for the plaintiffs to allege particular circumstances, not now appearing, which may modify the result. It is equitable as between the parties that the plaintiffs should recover the money stipulated for by the contract; therefore an opportunity should be given to amend, if desired.

Demurrer sustained.

NATIONAL BENEFIT CO. v. UNION HOSPITAL CO.

(Supreme Court of Minnesota, 1891. 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437.)

MITCHELL, J. This appeal is from an order overruling a demurrer to the complaint, and the sole question is whether it appears that the contract declared on is void on grounds of public policy as being in restraint of trade. The plaintiff, an Illinois corporation, and the defendant, a Wisconsin corporation, were each organized for and engaged in the same business, to wit, "issuing and selling, to such persons as might desire to purchase the same, certificates entitling the holders thereof, when sick or injured, to maintenance and to medical and surgical care, attention, and treatment in any hospital provided by said corporation, and to such support during the time said holders might be confined in such hospitals; and to provide hospitals, infirmaries, and such other places as might be necessary for the reception of the holders of the certificates issued by it without cost other than the cost of such certificates." The plaintiff was carrying on this business in a large number of the states of the Union, and had established a large and lucrative business of the character described in the states of Minnesota and Wisconsin and in the northern peninsula of Michigan, and had acquired many valuable contracts with hospitals throughout that territory entitling the holders of its certificates to treatment in said hospitals.

Thereupon the parties entered into the contract sued on, the principal features of which were: (1) That the plaintiff company agreed to refrain for the term of three years from selling certificates in the states of Minnesota, Wisconsin, and the northern peninsula of Michigan, except to railroad employes. (2) The plaintiff also agreed, by every proper means in its power, to secure to the defendant participation in all contracts and arrangements which it already had within that territory with hospitals; and whenever by such contracts it had the exclusive right to hospital service, so far as any company doing the same business was concerned, it would not consent to the substitution of parties other than defendant. (3) In consideration of these agreements on part of the plaintiff, the defendant agreed to pay to it certain sums of money, and also to refrain, during said term of three years, from selling certificates to the employes of any railway corpo-

ration doing business within the territory mentioned. The business carried on by these two companies was open to be engaged in within this territory by any other person or corporation organized for that purpose.

Shortly stated, the legal effect of this contract was a sale by plaintiff, for a valuable consideration, to defendant, of its business and goodwill within the territory mentioned, (except the right to sell certificates to railroad employes,) with a stipulation that it would refrain from engaging in such business within that territory for three years, and a like stipulation on part of defendant not to engage in the department of the business reserved by plaintiff. It will be observed that the restriction is not general, but limited both as to space and time, and is only co-extensive in space with the business transferred. Also, that the contract does not require either company to wholly refrain from engaging in the business for which it was organized, each remaining free to engage in it without restriction anywhere except within the designated territory; and, even in that, each may still pursue a certain department of such business. Moreover, both companies are purely private corporations, organized for purposes of private gain, and hence not charged with any public duty. Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all; hence this contract does not, and cannot, create any monopoly. The most that can be claimed against it is that it reduces by one the number of competitors. Nor can it tend to exclude any one from hospital treatment, its only effect being to reduce by one the number of companies from whom persons desiring to secure in this form the right to hospital treatment could purchase these "benefit certificates."

We feel safe in asserting that no modern decision can be found holding any such contract, under a similar state of facts, void because in restraint of trade. Formerly in England the courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and the state was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the

number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions, both English and American.

A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract. It is unnecessary at this time to go over ground so often traveled by others, and enter into any extended consideration of the decisions on this branch of the law. The principal cases on the subject, from the Year Books down, will be found collated in 2 Parsons on Contracts, 748, and also in the notes to *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. (9th Ed.) 694. See, also, *Alger v. Thacher*, 19 Pick. 51; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Beal v. Chase*, 31 Mich. 490; and *Navigation Co. v. Winsor*, 20 Wall. 64.

The general consensus of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade, but each case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject of the contract. ✓ Tested by these rules we find nothing legally objectionable in the contract under consideration. ✓ In addition to cases cited above, see, also, *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. Rep. 41, 13 Am. St. Rep. 23.

There are two classes of cases, some of which appellant has cited, which are often confounded with, but are clearly distinguishable from cases like the present and stand upon an entirely different footing. The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices. The other is where a corporation of a quasi public character charged with a public duty, as a railway company, gas company, or the like, enters into a contract restrictive of its business which would disable it from performing its duty to the public. Neither of these elements enters into this case.

Order affirmed.

VANDERBURGH, J., did not sit.

WICKENS v. EVANS.

(Court of Exchequer, 1829. 3 Younge & J. 318.)

The substance of the pleadings in this action of assumpsit is as follows: The declaration set out that the plaintiff was a box maker at Oxford and traveled into various parts of the country selling the trunks and boxes which he made; that one William Fletcher and the defendant were separately engaged in a like business; that by a contract between the three parties it was agreed to divide the whole country into three parts, allotting one part to each of the parties, to the exclusion of the others. Each party was to have the exclusive right to sell in his district during his life, and the other parties promised not to compete with him therein during their lives. The contract further provided that during their joint lives each should not buy any tea chests at a higher price than that named. It was also agreed that if, during their joint lives, any person should set up and oppose either of them in the trade of box and trunk making in England and Wales, they would meet together and enter into such mutual agreement as should be to their mutual interests, "it being their true intention not to do any act prejudicial to the interests of each other, but to aid and assist each other in the said trade and business to the utmost of their power." A penalty of £40. was provided for each breach of the contract with reference to the sale of trunks and boxes, and £10. with reference to the purchase of any tea chests. The breach assigned was ten offences under the contract relating to the sale of trunks and boxes. To two counts differing only as to breaches averred, there was a general demurrer.⁶

GARROW, B. This question, as it appears to me, is confined within a narrow compass, and, as we have all formed the same opinion, I shall state my view of it very shortly. The principles upon which the decisions upon subjects of this nature are founded, have been accurately stated; and, indeed, have so frequently and so long been acted upon, that they are now indisputable. A general, universal, restraint of trade, inasmuch as it affects the public property, and the interests of the community, is bad; and those to whose interests it more immediately relates, cannot make it good by any consideration passing between themselves. But, it is submitted, that there may be, upon a good consideration, a partial restraint of trade, and that an agreement for that purpose is sustainable, and has been sustained. The legality of a partial restraint of trade has been established in a variety of cases, and the general transactions of mankind furnish daily instances of its existence. Without resorting to the aid of black cotton lines, in order to divide all England into districts, there is no man engaged in trade who does not, in effect, impose some restraint upon himself in point of practice, by confining himself within a particular district, and circum-

⁶ This summary of the pleadings is substituted for the statement of facts.

scribing his trade within certain bounds. It has been supposed that the public are interested in precluding the parties from entering into the agreement now in question; but I think it very doubtful whether the benefit of the public would be best consulted by these three persons continuing to travel over the whole country, or by each confining himself to the district marked out in the map.

Let us see what is the case now presented. It appears, according to the recital in the agreement, that these three persons, in carrying on their business of box makers, had traveled into various parts of the country to vend their boxes and trunks, and had sustained great loss and inconvenience by reason of exercising their trade in the same places. This is the mischief and evil recited in the agreement; and what is the remedy they propose? Not a monopoly, except as between themselves, because every other man may come into their districts and vend his goods; all they propose is, that they shall not carry on a rivalry, nor continue any longer to trade throughout the country. This, then, is only a partial restraint of trade. But it is said that, admitting that to be so, there is no consideration extrinsic of the agreement itself; and that argument is illustrated by the cases of a master giving up his business to his apprentice or to his journeyman. It strikes me, however, that, in the present case, there is as good a consideration as in either of those alluded to. Each party here, before the agreement is entered into, has a trade in all the districts; and he agrees to retire, and to relinquish that trade in two of those districts, in order to secure the others in undisturbed possession.

An objection is then made to that part of the agreement, by which it is stipulated that, in case other persons shall begin to trade as box makers in any of the districts, the parties shall meet to devise means to promote their own views. What those means may be it is unnecessary to surmise; but we cannot presume that they will be illegal, and, therefore, this stipulation does not affect the validity of the agreement.

HULLOCK, B. I think this demurrer ought to be disallowed. The question is properly stated, when it is said to be, whether there be a sufficient consideration. It is conceded that there may be an agreement for a partial restraint of trade, provided there be a good consideration. This doctrine is to be found in Comyns' Digest, and is laid down in all the cases cited in the argument; and the question is said by Lord Kenyon, in *Davis v. Mann*, 5 East, 120, to have been at rest ever since the case of *Mitchel v. Reynolds*. I do not understand the principle upon which it is argued, that there is here no consideration, because it is not extrinsic or foreign to the instrument. The law makes no distinction of that kind, but looks whether there is, upon the face of the instrument, a good and valid consideration, that is to say, either a benefit to one party, or a loss to the other.

Upon that rule I should say, that, upon the face of this instrument,

there is a sufficient consideration. But, it is said, that the effect of this agreement is to create a monopoly; and that, by upholding its validity, we shall lead to other combinations for monopolizing trades. If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate. Upon the whole, then, I cannot distinguish this case from any of those cited in which an agreement for a partial restraint of trade has been supported.

VAUGHAN, B. I am entirely of the same opinion. The only question is, whether there appears upon the face of this agreement a sufficient consideration for the partial restraint of trade it contemplates. In consequence of the loss and inconvenience which it is recited the parties had before sustained, they entered into this agreement, by which the loss and benefit to each is reciprocal. In my opinion, this was an honest and upright contract, which has been the question in all the cases; and a contract by which the public are not injured, as they may be supplied upon easier terms.

Judgment for the plaintiff.

FOX SOLID PRESSED STEEL CO. v. SCHOEN.

(Circuit Court of the United States, W. D. Pennsylvania, 1896. 77 Fed. 29.)

This was a suit in equity by the Fox Solid Pressed Steel Company against Charles T. Schoen and the Schoen Manufacturing Company, arising out of a contract between the parties.

ACHESON, Circuit Judge. On and prior to October 10, 1891, the date of the written contract between the plaintiff, as party of the first part, and the defendants, as parties of the second part, both parties were engaged in the manufacture of center plates for car trucks under patents owned by them respectively; the plaintiff at Chicago, Ill., and the defendants at Pittsburgh, Pa. By the terms of the contract the plaintiff granted to the defendants the exclusive right to make center plates under the plaintiff's patents, and the defendants agreed to pay to the plaintiff $7\frac{1}{2}$ per centum of the gross selling price of all center plates sold by them; and it was stipulated that the plaintiff should have the right to make center plates "for application to pressed metal truck frames manufactured by it" upon the payment of a named royalty but should not otherwise engage in the manufacture of center plates. The contract contains this provision: "It is further agreed that the parties of the second part will not engage, during the life of this agreement, in the manufacture of truck frames for moving vehicles, or any part of such frames, when made of pressed metal."

The present controversy grows out of a difference between the

parties as to the meaning of this clause. The plaintiff contends that the clause prohibits the defendants not only from making pressed metal truck frames and parts of such frames, but also from making out of pressed metal any part of a truck frame, of whatsoever kind the truck frame may be. ✓ The defendants maintain that the prohibition is against the making of pressed metal truck frames and parts of a pressed metal truck frame.⁷ ✓

Upon the question of the proper construction of this clause, my opinion, under all the circumstances of the case, accords with the view upon which the defendants insist. But finally, if, as the plaintiff contends, this clause really interdicts the defendants' manufacture out of pressed metal of any part of a diamond truck frame, then the clause, in my judgment, is in unreasonable restraint of trade, and not enforceable. *Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 557. The public interest is much promoted by the use of pressed metal parts in the repair or improvement of diamond truck frames. Now, the plaintiff's business is the manufacture of pressed metal truck frames, and the evidence shows that its manufacturing capacity is fully taxed to meet the demand for that class of truck frames. This prohibitory clause, it will be observed, is without limit as respects place. To enforce it by the injunction here sought would be to deprive the public of the defendants' needed industry, and this, too, without reasonable benefit to the plaintiff. The covenants in restraint of trade hitherto sustained have been those connected with the sale or purchase of a business and its good will, or some analogous subject-matter, where the restraint was no more extensive than was reasonably necessary for the protection of the covenantee. *Nester v. Brewing Co.*, 161 Pa. St. 473, 481, 29 Atl. 102, 104. Here, however, there was no sale or purchase of any business relating to the manufacture of truck frames, and no circumstances existed to justify so sweeping a restriction as the plaintiff claims.

Let a decree be drawn dismissing the bill, with costs.

CLARK v. NEEDHAM.

(Supreme Court of Michigan, 1900. 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559.)

Action by George D. Clark and William L. Cowles against Alvin W. Needham and others. Verdict for defendants, and plaintiffs appeal.

Plaintiffs are copartners carrying on a manufacturing business in Connecticut. One portion of their business was the manufacture

⁷ The part of the opinion dealing with the construction of the clause in question is omitted.

of chaplets, which consist of pieces of wire and a plate riveted to the ends to support cores in castings. Double-headed chaplets are used in making cast-iron boilers and heavier castings. The defendants are copartners carrying on a like business in Michigan, at Detroit. Negotiations were entered into between the parties to induce plaintiffs to cease the manufacture of these chaplets. These negotiations culminated on November 4, 1897, in making the following leases, so called:

"This agreement, entered into this 4th day of November, 1897, between Clark & Cowles, of Plainville, Connecticut, as parties of the first part, and the Empire Wire and Nail Company, of Detroit, Michigan, as parties of the second part, witnesseth: The first parties, in consideration of the payments to be made to them as hereinafter stated by the second parties, do hereby lease and let to the said second parties, their heirs, executors, and assigns, all of the machinery of every name and nature now used or belonging to the parties of the first part, in their building at Plainville, Conn., or elsewhere, used by them or others for the manufacture of chaplets or anchors, for the term of one year from and after date hereof, with the right in second parties to extend said time one year at a time until the expiration of five years, if the second parties give to first parties thirty days' notice of their intention to extend the time for another year, before the expiration of the current year. In consideration of the above and the agreement hereinafter set forth, the second parties agree to pay to the first party the sum of fifteen hundred dollars per year, payable three hundred dollars in cash, and one hundred dollars each month in advance. As a part consideration of the above, and the payment of the sum aforesaid by the second parties, the first parties agree and do hereby bind themselves not to manufacture or sell, or in any way engage in the manufacture or sale of, said chaplets or anchors during the continuance of this lease, except that they may sell to and manufacture for the A. A. Griffing Iron Co. of Jersey City, N. J., double-headed chaplets for their own use. * * *" The balance of this agreement is immaterial.

"This agreement, entered into this 4th day of November, 1897, between the Empire Wire and Nail Co., of Detroit, Michigan, party of the first part, and Clark & Cowles, of Plainville, Conn., parties of the second part, witnesseth: The first party in consideration of one dollar, receipt of which is hereby acknowledged, and other valuable considerations, received to its full satisfaction of the parties of the second part, does hereby lease and let to the said second parties, their heirs, executors, and assigns, all the machinery of every name and nature now controlled by or belonging to the party of the first part, by virtue of a lease from the parties of the second part, of even date herewith, situated in the buildings of the parties of the second part at Plainville, Conn., or elsewhere, used by them or others for the manufacture of chaplets or anchors, for the term of one year from and after date hereof, with the right in the second party to extend said

lease for one year at a time until the expiration of five years for the purpose of manufacturing anything whatever, except chaplets or anchors; it being the intention hereof to permit the parties of the second part, their heirs, executors, or assigns, to use said machinery for any purpose, except the manufacture of said chaplets or anchors." Defendants paid for one year. It is claimed by the plaintiffs that the agreement was extended for the second year. Defendants claim that it was not. [Plaintiffs sued to recover for the cash payment due under the lease, and for the rent for the month of June, 1899. The court directed a verdict for the defendants on the ground that the agreement was void as against public policy.]

GRANT, J. (after stating the facts). These two instruments constitute but one instrument, and must be construed together. Briefly stated, the agreement is this: Plaintiffs, in consideration of \$1,500, to be paid to them annually, agreed for a period of five years not to manufacture or sell chaplets, except for only one party. Plaintiffs' sales were not limited to the place of manufacture, but extended into other states. The plain object of the agreement was to substantially close this part of plaintiffs' business, and to give defendants a monopoly of it. The parties evidently recognized the invalidity of such a contract, put in plain and unequivocal language, and sought to evade it by these two so-called leases. The arrangement was a bare subterfuge to evade the law. Defendants did not buy out plaintiffs' business, machinery, and plant, or lease them for the purpose of continuing their (plaintiffs') business. The result intended and accomplished was to close that part of plaintiffs' business, to throw their employes out of employment, and to deprive the public of any benefit from the continuance of their business. This is not the case of *Beal v. Chase*, 31 Mich. 490, where Beal purchased the entire plant, business, and good will of Chase for the purpose of continuing the same business. In that case both the employes and the public derived the same benefit as though the business were to be continued by Chase.

The learned counsel for plaintiffs concede the invalidity of those contracts which are entered into for the express purpose of, and result in, closing one's business for the benefit of a rival business, in throwing employes out of employment, and in depriving the public of the benefit of such business. Such contracts tend to destroy competition and create monopolies, and are void. Plaintiffs, however, seek to avoid the result of this contract on the ground that it is not in general restraint of trade, but is limited as to time and subject-matter. They concede that it is unlimited as to territory, and that the contract, if binding, covers the entire United States. They cite, among other cases, *Ammunition Co. v. Nordenfelt* [1893] 1 Ch. Div. 630, and *Mitchel v. Reynolds*, 1 P. Wms. 181. Those cases are, in their facts, the parallel of those in *Beal v. Chase*; and *Mitchel v. Reynolds* is cited in the learned opinion of Justice Christiancy in *Beal v. Chase* (page 518), to which we refer for a statement and analysis of that case.

Any such contract is invalid, whether the restraint be for one year or any number of years, or is unlimited as to time. The agreement to close one part of a business is as much against the policy of the law as a contract to close the entire. The one is as reprehensible as the other. They only differ in degree.

Under this contention a party might agree with one person to close one part of his manufactory, and then agree with a second person to close the other part; the two constituting his entire business. In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325, it is said: "All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." See, also, *Wright v. Ryder*, 36 Cal. 342; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. This contract is clearly within the inhibition of the laws of the United States (26 Stat. 209, c. 647) and the laws of this state (Comp. Laws, § 11,377). We settled the principle governing contracts of this character in *Association v. Starkey*, 84 Mich. 76, 47 N. W. 604, and further discussion is unnecessary.

Judgment affirmed. The other Justices concur.

CHAPIN v. BROWN.

(Supreme Court of Iowa, 1891. 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297.)

ROTHROCK, J. It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement:

"We, the undersigned grocerymen of Storm Lake, finding the business of purchasing butter of farmers and handling the same very burdensome, and of material loss to us, and believing the same could be handled as advantageously by persons who would make butter buying and handling an exclusive business, and whereas, the firm of D. & E. Chapin, through their agent, assure us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement and pledge ourselves to each other and to the said firm of D. & E. Chapin that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however, shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. & E. Chapin, in whose favor we abandon the business, shall open rooms conveniently located for buy-

ing butter; that they shall keep a man in attendance during all business days and hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might seem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. & E. Chapin shall not direct their checks or persons taking the same to any particular store for payment. That they shall not buy in connection with any dry goods or grocery store.

Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dissatisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and void. This engagement shall take effect and be in force from and after such time as when it shall have been subscribed to by each grocery house in this town, and when the firm of D. & E. Chapin shall designate, provided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. & E. Chapin, provided said firm shall fix as high price as eggs are at the time worth to ship. W. C. Kinne & Co. Fred Scholler. Brown Bros. J. O. Douglas. W. A. Jones. Geo. E. Ford & Bro. W. Lownsberry. Libby & Rae. D. & E. Chapin."

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake, and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with plaintiffs' business, and alienated their trade to the extent of 5,000 pounds of butter, upon which plaintiffs would have realized a profit of 3 cents a pound, making in all \$150 damages suffered by plaintiffs. Judgment is demanded for said sum, and

an injunction is prayed restraining the defendants from continuing in said business.

Among the several grounds of objection to the granting of an injunction we regard two of them as material. They are as follows: "First, that the agreement in writing is void for want of consideration, as there is no money value inuring to the benefit of the defendants herein; and, second, that said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is therefore in restraint of trade, to the detriment of the producers and consumers of butter at that place and in that vicinity."⁸

It is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor for the good-will of any business. So far as appears, they went into the town of Storm Lake, and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. In all the search we have made for authority upon this branch of the controversy we have found no warrant in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations. But such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry goods merchants of Storm Lake that if they would all quit the business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

2. But it appears to us that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced.

Affirmed.

⁸ A discussion of the history of the law on this subject is omitted.

CHAPTER V

CONTRACTS INSTRUMENTAL IN CREATING A MONOPOLY
OR A COMBINATION

KELLOGG v. LARKIN.

(Supreme Court of Wisconsin, 1851. 3 Pin. 123, 56 Am. Dec. 164.)

HOWE, J.¹ The plaintiff below, Larkin, declared in covenant for the rents reserved in a lease executed by him to Kellogg & Webb, of one portion of a certain warehouse, situated in the fifth ward of the city of Milwaukee. The lease contained a covenant on the part of the plaintiff by which he obliged himself, during the term for which the premises were demised, to wit: From the 7th of January to the 1st day of August following, "not to purchase, store, or handle any wheat in the Milwaukee market, except under the direction" of the defendants.

¶ This covenant, as is said, being in partial restraint of trade is *prima facie* bad, and should be aided by an averment of some special circumstances, showing a good reason, independent of a mere pecuniary consideration, to support it. And the want of any such averment, it is further said, is a substantial defect in the declaration which entitles the defendants to judgment upon the demurrer, notwithstanding the insufficiency of their plea.

The only reason ever assigned in support of such restrictions is, that they are necessary or useful to the party with whom the contract is made, as a protection to him in the prosecution of his business. And it is not necessary that such reason should be expressly averred, if it sufficiently appears from the contract itself. Here the lease is set forth at length in the declaration, and that sufficiently discloses the interest which the defendants had in requiring protection against the competition of the plaintiff. And so the interest or reason is usually made to appear. See, for instances: *Mitchell v. Reynolds*, 1 P. Wms., 181; *Mallam v. May*, 11 Mees & W. 652; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157.

I have found no case in which these circumstances or reasons have been expressly averred, although it is suggested that they might be set out by averment when they did not appear upon the face of the contract. *Ross v. Sadgbeer*, 21 Wend. (N. Y.) 166.

The declaration is therefore sufficient in substance to support the judgment of the county court. Let us consider if the plea demurred to discloses a good answer to that declaration.

¹ The statement of facts and parts of the opinion are omitted.

This plea, in its character, is quite original. I think it would be difficult to say what precedent gave form to it. But in its structure it is ingenious; I think it would be quite as difficult to say what canon of good pleading was violated by it. But I have to consider, not its form, but its body in substance.

Its material averments, I think, may be stated as follows:

1. That the lease declared upon "was made, entered into and executed for the further countenancing and proceeding in the undertakings, schemes and plans of the produce association," of which the parties to the lease were severally members.

2. That the produce association was composed of the proprietors of certain warehouses, to the number of eleven, and the owners of certain mills in the city of Milwaukee.

3. That the produce association, on the 29th day of December, 1849, entered into an agreement by which the mill owners were parties of the first part, and the warehousemen were parties of the second part, the prominent features of which agreement were as follows:

First. The mill owners agree to pay the warehousemen "four cents per bushel commission, or storage, on each and every bushel of wheat coming to the Milwaukee market to be disposed of, by sale in the street, or by storage (so far as they are able to control the same);" from that date to the 1st day of August, then next.

Second. The warehousemen, in consideration thereof, agree "to give to the parties of the first part, full, absolute and uninterrupted control of the Milwaukee wheat market, from the date hereof, up to the 1st day of August, A. D. 1850, so far as they shall be able to do so by virtue of their capacity as warehousemen or vessel and dock owners; that they will not themselves, or through the agency of others, directly or indirectly, under any name or pretense whatsoever, purchase, contract or bargain for any wheat in the Milwaukee market, from the date hereof, up to the 1st day of August, A. D. 1850, nor make any contracts for the storage of wheat during the time aforesaid, except as agents under the direction and control of the parties of the first part."

Third. That nothing herein contained is to give the said parties of the first part, any right to close the warehouses against the storage of wheat, or to fix a higher rate of storage than four cents per bushel.

Fourth. That "the parties of the second part shall at all times hold themselves in readiness to purchase, store and deliver, or ship wheat for account of the parties of the first part, at the rate of four cents per bushel, as aforesaid," and,

Fifth. That the mill owners shall pay to the warehousemen four cents per bushel upon all wheat received into the mills for shipment or grinding, "grist work excepted."

4. It is averred that the objects and purposes of the association were to carry out and perform these agreed plans and schemes.

5. It is averred that the association, its general plans, schemes, attempts and undertakings, tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce the price of the commodity of wheat and to stifle fair and lawful rivalry and competition of dealers therein. * * *

The plaintiffs in error aver that this agreement "tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce the price of the commodity of wheat, and to stifle fair and lawful rivalry and competition of dealers therein," and this view was enforced by an argument of great length, and exhibiting much ingenuity and research.

Before proceeding to discuss the question whether this agreement does in fact contravene public policy, I desire to refer to the very happy and every way timely remarks of Mr. Story. He says: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." Story on Conf. Laws, § 546.

And I desire to add that as a general rule, the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses. And a legislative enactment would seem to be the least objectionable form of exposition, for these two reasons:

1. Because it would operate prospectively as a guide to future negotiations, and would not, like a judgment of a court, annul a contract already concluded in good faith, and upon a valuable consideration; and

2. Because a rule so established has a wider circulation among the people, and enters more generally into the information of the public.

I by no means intend to deny the right or the propriety of judicially determining, that a contract which is actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se*, nothing that is *malum prohibitum*, to be void as contravening the policy of the state, it should be satisfied that

the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the individual, than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject, than the rights of the state.

And having ventured upon these few preliminary reflections I disclaim all aid from any one of them in the determination of this cause, but I affirm, that, upon the spirit of the letter of the law, as it has been adjudicated for one hundred and forty years, the agreement disclosed in the plea of the plaintiff in error is not against the public policy. * * *

A general restraint which is defined to be "an agreement not to carry on a certain business anywhere" (Story on Conf. Laws, § 550) is against public policy, and is void. So it was held after several arguments in *Mitchell v. Reynolds*, supra, and the doctrine has been affirmed and reaffirmed in numerous cases since, and I am not aware of the propriety of the rule being questioned in any single case. Parker, J., in *Mitchell v. Reynolds*, states the reasons upon which the rule is founded, as follows:

"First. The mischief which may arise from them. 1. To the party by the loss of his livelihood, and the subsistence of his family. 2. To the public by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to, as for instance, from corporations who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves. 3. Because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London, what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other."

I do not notice here the 4th and 5th reasons assigned, because the 4th is declared by the learned judge to be in favor of the contract, and so opposed to the rule, and the 5th applies to contracts with a consideration, which he evidently supposes to be without the rule, and which he says the law is not so unreasonable as to declare void, "for fear of an uncertain injury to the party."

Now, in applying the rule to any given case, it is important that we attend to the reasons upon which it is founded. "Who so knoweth not the reason of the law, knoweth not the law."

And in regard to the reasons above stated, I have to say that I very much question whether, here in Wisconsin at the present time, and in

view of our present social and political position, more than one of them is entitled to any considerable importance, in our consideration. The opportunities for employment are so abundant, and the demand for labor on all sides is so pressing and urgent and the supply so limited, that I much question, were we to consider the subject as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family, by an agreement which merely excluded him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural and commercial industry open to him.

And while we have no privileged classes here, but little individual, and less associated capital, and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting and so remunerative, giving to labor the greatest freedom for competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantages in trade, or to reduce it to few hands.

While so much more remains to be done than all hands can do, I question if the better way to foster individual effort be not to secure it the greatest possible freedom, either to direct it to any particular calling, or to abandon that calling to another for an equivalent.

And while apprentices are sought for oftener than they seek apprenticeships, we need hardly fear, I think, that they will be subject to great vexation by their masters on account of any anticipated prejudice to their custom. Besides, if such indirect practices should be resorted to here to obtain similar bonds, as Lord Macclesfield says was the case in his time, perhaps the courts would find those indirect practices themselves as good a pretext for setting aside the bonds as any real or fancied injury to the public policy arising therefrom would afford.

As to the third reason, I apprehend it would be thought a dangerous precedent were a court to annul any other voluntary bond for which a voluntary consideration has been received, upon the ground that it was of no use to the obligee. Ordinarily, we say, let parties who are competent to contract determine for themselves what contracts will profit them. And certainly I do not understand why that should be called a certain loss on one side when, for what the party has abandoned, he has received an ample equivalent. If the loss is supposed to arise from a total want of consideration, or from its inadequacy, these are distinct grounds for interference.

It is enough, however, that one good reason still remains to uphold the rule. The loss to society of a valuable member is as great a public injury now as it ever was, and as great here as anywhere. I hope, indeed, that the market value of a human being is higher now than it was in England at the beginning of the eighteenth century, when the case of *Mitchell v. Reynolds* was decided. The capacity of an in-

dividual to produce (using that word in its largest sense) constitutes his value to the public. That branch of industry in which a man has been educated, and to which he is accustomed, and for the abandonment of which he demands compensation, is supposed to be the one in which he can render the greatest profit. The value of what he produces belongs to himself. The actual product belongs immediately to him who employs him, but mediately to the state, and goes to swell the aggregate of public wealth. Therefore, the law says to each and every tradesman: You shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if any man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect, you are held discharged from such bargain, because of the advantage that will arise to the public from so holding.

But none of these reasons apply to what are called partial or limited restraints, or to agreements not to exercise a particular calling in a particular place. Indeed these seem to be not so much restraints upon trade as upon tradesmen. For when a silversmith obligates himself not to pursue that particular business in Millwaukee, the trade need not necessarily be restrained thereby, for he can pursue if he pleases in Racine, or elsewhere in the state; and to all legal intendment with equal advantage to himself and to the public. Accordingly, such agreements have uniformly been upheld by the courts, when founded upon a sufficient consideration. * * *

Now it is manifest, that by every known rule of construction, the agreement exhibited to us in the defendant's plea is one falling within the principle of the cases above cited. The restraint it imposed upon trade, if any, was partial and limited; limited in every particular referred to in the books. It was limited as to persons, as to object, as to place, and as to time (though this last is not essential). As to persons, it was limited to the proprietors of eleven warehouses; as to object, it was limited to the traffic in wheat; as to place, it was limited to the Milwaukee market; and as to time, to a period of about seven months.

It was indeed objected upon the argument that there was nothing upon the record to show the extent of the Milwaukee market. But surely this objection cannot be well taken. Admitting for the purpose of the argument, the law to be that only so much restraint upon the obligor will be upheld by the courts as shall appear to the court to be necessary to the protection of the obligee, still the agreement is before us, and if we are to construe it as a contract, and with reference only to the apparent intention of the parties, I think we would find no difficulty in holding that the contracting parties intended by that term to confine themselves to the market in Milwaukee, a city which

we judicially know to exist, and the market or place of sale in which, I think we may legally infer, is not more extensive than the boundaries of the city.

If on the contrary we are to construe it as a part of the plea in the case, having reference to that degree of certainty requisite in good pleading, I have simply to remark, that whatever is uncertain in this behalf, is the fault of the plaintiffs in error, from whom the pleading comes; and because they have not averred the Milwaukee market to have an unreasonable extent, we are to presume that it has not. I Ch. Pl. 345. In either point of view the restraint was limited, and the limits were reasonable.

But the parties are said to have combined and agreed not to engage in trade, and that this was clearly against public policy; and in the plea, the plaintiffs and defendants, together with divers other persons, are averred to have formed themselves and entered into an association. Let this matter be understood, and we need not be frightened by the terms employed to characterize it. The agreement discloses no combination and no association in the sense in which the words are evidently used. It is of two parts. It creates mutual obligations, and provides mutual equivalents, as every contract, *inter partes*, does. But there is no identity of interest or of duty between the parties of the second part, no more than always exists between landlord and tenant. The warehousemen received their daily compensation, and the millers received their daily profits.

And there was no combination between the parties of the second part, the warehousemen. Perhaps they must be considered to have jointly promised the party of the first part, but it is not disclosed that they have promised each other, which I understand they must have done, before they can be said to have combined.

Besides, if the design be lawful, as the abandonment of trade in a particular place is, what matter how many combine in it? But at all events, it is said, that as creating a particular restraint, the contract is *prima facie* bad; and the facts and circumstances which will justify it, if any such exist, should be made to appear. * * *

What are the special circumstances in this case? The obligees are the proprietors of several mills in the city of Milwaukee, for the manufacture of wheat into flour. Will any one presume to say here is not as good a reason for upholding a promise not to traffic in wheat in Milwaukee, to the prejudice of these proprietors, for the term of seven months?

But how should these special circumstances be made to appear? By averment in the pleadings and by proof upon the trial? Certainly not. It was not so in the case just cited. They appeared upon the face of the instrument sued upon, by way of preamble to the conditions, were set out on prayer of oyer, and the question arose upon demurrer to the declaration.

Here these circumstances appear in the agreement which is set out in the plea, and the question arises upon demurrer to the plea.

It is insisted further that the contract of the 29th December, 1849, discloses an attempt to create a monopoly of the wheat market. And in support of this position we are again referred to the leading case.

"It may be useful," says Parker, J., "and lawful to restrain him from trading in some places, unless he intends a monopoly, which is a crime."

But the word monopoly is used to signify something which is very different from aught that could have been intended by this contract. The learned judge himself interprets it in another part of the same opinion. He says, "that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law." He adds that when restrained to particular places or persons, if lawfully and fairly obtained, the same is not a monopoly.

Now could the parties possibly have intended by this simple contract, to vest in the mill owners the sole exercise of the traffic in wheat, throughout the state of Wisconsin? If so, there was the most extraordinary disproportion of means to the end ever betrayed in the negotiations of business men. But they intended nothing of the kind. Not even a monopoly of the market in Milwaukee. On the contrary, these mill owners who desired to purchase wheat for manufacturing, evidently sought to protect themselves against the competition (doubtless often sharp and injurious) of the warehousemen.

The obligors possessed large facilities as warehousemen, vessel and dock owners, for storing and freighting the produce which came to that market. Their interests led them to deal in that produce in the bulk, because so it would pay the most storage and the most freight. On the other hand, to give employment to their mills, the obligees sought the same produce for manufacture. Here their interests clashed. The contract before us is the result of a compromise of those conflicting interests. And if the argument needed any such beggarly support, I think it might well be asked if the public interests were not promoted, rather than prejudiced by an arrangement which saved to the wealth of our state, the earnings from the manufacture of so large a quantity of wheat as we may reasonably suppose to have been floured in the Milwaukee Mills, and which, but for this arrangement, would have been floured in the mills of some eastern state.

I waive this consideration. I say there was no monopoly intended, none effected. We cannot fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee, the market was open to the fiercest competition of all the world, except these obligors.

True, the language of the contract is, that the parties of the second part, "agree to give the parties of the first part, full, absolute and uninterrupted control of the Milwaukee wheat market;" and had it

stopped here it might well have been urged that there was an agreement for a monopoly of the trade in that market. And if that had been the only market for Wisconsin (which it is not), it might well be said the agreement was as pernicious as an agreement to strike the sun from the system. Either, if performed, would be ruinous to the farmers of Wisconsin; but I submit that the impossibility of performing, would constitute as good a reason for holding either of them void, as the injurious consequences certain to result from performance. But this stipulation is qualified by adding the words, "so far as they shall be able to do so," and had they stopped here, to any objection that a monopoly was agreed upon, it might well be answered, that the giving of such control or such monopoly (if they are synonymous terms), of the Milwaukee wheat market as those parties could give, was no monopoly at all. But the agreement is still further limited by the words, "by virtue of their capacity of warehousemen, vessel and dock owners."

It is then simply an agreement to give to the mill owners, such control of that market as they can give by virtue of those specified employments. In other and equivalent terms, it is a transfer of such control as the obligors possessed in right of their employment as warehousemen, etc. Such are the general terms selected by the draftsmen to express the complete abandonment of that trade in that market to the obligees.

Personally, the obligors were to do nothing to confirm the mill owners in that trade to the exclusion of anybody but themselves. Accordingly they go on to render the nature and meaning of the stipulation more definite, by specifying several things which the parties of the second part shall not do, but not one which they shall do. * * *

But the crowning objection urged against the validity of this agreement is, that it tends "to depress the wheat market; to reduce the price of the commodity of wheat, and to stifle the fair and lawful rivalry and competition therein." It is quite observable that the word "stifle" is used more adroitly than aptly. But if its use is insisted upon, I admit that it does tend to stifle the competition of these obligors, and I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting has not before been denied or questioned for two hundred years, unless two cases reported in 4 Denio, 349, 47 Am. Dec. 258, and 5 Denio, 434, 49 Am. Dec. 282, are to be considered as denying the right. Nor can I perceive how this agreement can reduce the price of wheat, below its actual market value.

Wheat, being an article of almost universal consumption, has a market everywhere, and a value in every market. And that value in any particular place is determined, less by the number of purchasers in that place, than by its distance from, and means of communication with the great central markets of the country and of the world. It is fluctuating to be sure, but usually it is very accurately ascertained,

and well understood by the people. And I cannot suppose that the agreement of those warehousemen not to purchase that great staple upon their own account would affect its value, more than the agreement of so many brokers not to take foreign gold in a particular place would diminish the current value of such coin. Even if this contract had removed all competition from that market, and the mill owners had taken advantage of that exemption to lower their bids, one of two results must have followed. Either that product would have been wholly driven from the market, or new competitions would have entered the field to purchase. Either result would have defeated the very object which the parties had in view. It was said, indeed, upon the argument, that foreign capital was excluded from the market by this contract, because the essential facilities of trade were denied thereto. But the agreement will not warrant any such interpretation. On the contrary, the power to close the warehouses against the storage of wheat, or to demand exorbitant prices therefor is denied to the obligees by the express terms of the instrument.

Numerous cases were cited upon the argument in support of this last averment. Few of them, however, bear any analogy to the case before us. Most of those cases arose upon secret agreements not to bid at auction sales, or upon the employment of secret bidders. All such secret arrangements are very properly discountenanced by the courts, and forbidden by the law. They are frauds upon the party who is uninformed of them and who acts in good faith. * * *

But the distinction between the case at bar, and the case referred to is too apparent to require illustration. And I would not have felt called upon to notice those cases at all, but that they have been supposed to sustain two other decisions pronounced by the supreme court of New York, and which are claimed by the plaintiffs in error to be entirely decisive of the main question presented upon this record. I refer to the cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282. These cases arose upon contracts between different transportation companies upon the Erie canal, by which the parties agreed to stock their capital, and turn their earnings into a common fund, to be then apportioned between the different proprietors, under certain regulations contained in the articles of agreement.

The purpose assigned for the arrangement was the establishing of fair and uniform rates of freight, so equalizing the business among themselves as to avoid all unnecessary expense in doing the same. In the case first mentioned, the agreement was held to be void as conflicting with a statute of that state. In the second case the same court held the agreement void at common law. In the former case, Jewett, J., remarks: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal to it." And in the latter case, McKissock, J., observes that: "While the introductory terms

of the agreement proposed nothing apparently objectionable, the ultimate object is very manifest, and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition." And again: "As the canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state. If then, in addition to the evils already pointed out, as incident to this confederacy, a diminution of the revenue of the state would follow, of which there can be no doubt, as our canals have rivals by no means impotent, in the great inland carrying trade of the north and west, the question whether the association can be upheld, becomes one of momentous import."

Such reasons are assigned in support of the judgments pronounced in those cases. I would be reluctant to subscribe to them. I think it would be unsafe to adopt as a rule of law, every maxim which is current in the counting room. It was said some three hundred years ago, that trade and traffic were the life of every commonwealth, especially of an island. *City of London's Case*, 8 Co., 125.

If it be true, also, that competition is the life of trade, it may follow such premises, that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below, or raising them above values, (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, it should have been urged against the agreement, that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial re-

straint of trade, ever since the case of *Mitchell v. Reynolds*, supra, was decided. And upon the argument of this cause it was earnestly contended that some such object should have been expressly averred by the plaintiff in his declaration, in order to support the restraint imposed upon the lessor, by one of the covenants in the lease declared upon.

But upon the abstract question whether the agreements disclosed in those cases did contravene public policy, the decisions therein pronounced are entirely conclusive upon us. And if the policy of that great state imposes upon her citizens the obligation of unrestrained and unrelenting competition in the business of transportation upon her canals, in order to swell the revenues from that already munificent source, I have nothing to urge against it.

I am not sure I should have discovered the rule applied in the determination of those cases, had it not been disclosed to me by the high authority of that court. Entertaining the views I do of the extreme caution to be observed in setting aside bona fide contracts in behalf of public policy, I am not sure I should have found, as a legal presumption, that when the parties to those contracts had combined their efforts and capital in order to diminish their expenses and increase their profits, they would have so abused the advantages thereby secured as to drive the carrying trade into the hands of those potent rivals, and thus sacrifice all profit.

But entirely controlling as those judgments are upon the question decided, they are far from being decisive of the case before us; for those agreements are broadly distinguished from the one I am considering, in the following characteristics: The theater upon which the restraint was imposed by those contracts was the property of the state, was built by the state, from which the state received the revenues. Here the theater is the city of Milwaukee, from which the state receives no revenue except what is derived from ordinary taxation. There the theater was the only one within the state affording like facilities to the same trade. Here the city of Milwaukee is only one (though doubtless the most considerable) of very many markets within the state for the sale of wheat. There the combination comprised, in one case, a large portion, and, in the other, all the facilities employed upon the canal. Here the record does not inform us what portion of the facilities for the wheat trade existing in Milwaukee are placed under the control of the mill owners. There, an unlimited power was reserved to raise the price of transportation. Here the right to increase the price of storage above four cents per bushel is expressly denied.

Because, therefore, the restraint imposed by this agreement is limited and reasonable, and because it is supported by a good consideration, in the judgment of this court, the same does not contravene public policy, is not void, and the judgment of the county court must be affirmed.

WEST VIRGINIA TRANSP. CO. v. OHIO RIVER PIPE
LINE CO.

(Supreme Court of Appeals of West Virginia, 1883. 22 W. Va. 600, 46 Am. Rep. 527.)

To a bill to enjoin the laying of certain pipe lines, the defendants demurred, and also filed joint and several answers. On final hearing, dismissal of the bill was decreed. From this ruling the West Virginia Transportation Company appealed.²

GREEN, J. The real question involved in this case is: Should the courts at the instance of the West Virginia Transportation Company enforce the grants and contracts made with it by E. L. Gale and wife, dated respectively January 31, 1870, and October 23, 1873? These two contracts are identical in language, except that the first applied to lands in Ritchie county and the second to lands in Wood county adjoining. The first of these contracts is in the following language:

"We, the undersigned, for and in consideration of the sum of one dollar, receipt of which is hereby acknowledged, do hereby grant unto the West Virginia Transportation Company, a company incorporated under special act of the Legislature of West Virginia, passed February 26, 1867, and their assigns, the exclusive right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil, water or other liquids along, through and under lands owned by the undersigned in Ritchie county in the State of West Virginia; also the right to construct and maintain a telegraph along said tubing, and the privilege to remove said tubing and telegraph at pleasure.

"Witness our hands and seals this 31st day of January, 1870.

"E. L. Gale. [Seal.]

"Mary Gale. [Seal.]"

It was duly acknowledged and admitted to record in Ritchie county on March 15, 1870.

When these grants and contracts were made, Mary Gale, the wife of E. L. Gale, owned a tract of land lying partly in Wood and partly in Ritchie county, West Virginia, containing about two thousand acres, which had been conveyed to Mary Gale, the wife of E. L. Gale, as long ago as March 7, 1854. Subsequently to the recordation of said grants and contracts of January 31, 1870, and October 23, 1873, that is, on January 26, 1875, said Gale and wife in consideration of eight thousand one hundred and forty-six dollars and fifty-six cents conveyed to James M. Stephenson, Thompson Leach, W. Vrooman, C. H. Shattuck and H. H. Moss a moiety of one thousand acres of this land with general warranty of title, which deed was duly recorded on July 6, 1875. These grantees afterwards for convenience in managing said

² The remainder of the statement of facts is omitted.

property assumed the name of the Wood County Petroleum Company. They claim, that, if these grants and contracts of date January 31, 1870, and October 23, 1873, were binding grants and contracts, which the courts would enforce between the original parties to them, nevertheless they would not be enforced against them, as they were purchased for valuable consideration without notice of their existence.³

From the views I take of this case I deem it unnecessary to consider or determine, whether the persons known as the Wood County Petroleum Company are or are not to be regarded as having either constructive or implied notice of these contracts and grants by Gale and wife with and to the West Virginia Transportation Company. As all questions involved in this cause can be determined without considering this question and by confining our attention to the question, whether the courts ought to enforce in favor of the West Virginia Transportation Company these grants and contracts as against the original obligors and grantors, we will consider this latter question only.⁴

From the principles, which underlie all the cases, the inference must be necessarily drawn, that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided of course it be shown clearly, that the peculiar business thus attempted to be restrained is of such a character, that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest.

Are there any sorts of business of this peculiar character? It seems to me that there are, and that they have been recognized as possessing this peculiar character both by the statute law and by the decisions of the court. Are not railroading and telegraphing forms of business, which are now universally recognized as possessing this peculiar character? Look at the Legislature of our own state in reference to these sorts of business and see if it does not distinctly recognize them as possessing this peculiar character? Our statute law provides for the condemnation of lands by railroad and telegraph companies; and by pursuing the provisions of the statute law these companies may acquire lands for their purposes without the consent of the owners of such lands. Chapter 52 and chapter 42 of the Code of West Virginia. In conferring on such companies the power to exercise at their pleasure the state's power of eminent domain and the power thus to take land without the owner's consent for railroading and telegraphing the

³ The argument of counsel as to the grantee's having constructive notice of the covenant is omitted.

⁴ The court then holds the contract to grant a right to lay pipe lines through the Gale tract exclusive of a like right in the grantors or in any purchaser from them; the contract covering oil produced on that tract and on any other land also. This is followed by a discussion of the meaning of the term, "reasonable" in connection with contracts in restraint of trade.

Legislature has emphatically declared, that the business of railroading and telegraphing is business in which the people of the state have such great and direct interest, that no individual landowner shall prevent this business of railroading and telegraphing being carried on at every locality in the state, where any company may choose to engage in such business. After such a legislative declaration the courts could not say that in any particular locality, however limited, the public had not such a direct interest in railroading and telegraphing, that its interest would not be prejudiced by any person or corporation entering into a contract with another, whereby the obligor should bind himself to impede the making of such railroad or telegraph through any locality however small by refusing to grant a right of way through such locality or by refusing to permit a railroad or telegraph to pass through such locality. Such a contract would be necessarily prejudicial to the public interest as the Legislature has recognized the public interest to have a telegraph or railroad through every parcel of land as so clear, as to justify the condemnation of every such parcel of land without any kind of enquiry as to the public utility of the particular railroad or telegraph through that parcel of land.

The statute law assumes as self-evident, that the public interest is promoted in the building of a railroad or telegraph through each particular parcel of land; and the courts must therefore act on this assumption in every case, and as a consequence upon the principle, that the public interest is promoted by the business of railroading and telegraphing being done on each parcel of land, the courts must hold in accordance with the principles underlying all the decided cases, that no person or corporation can restrict this business being done on any parcel of land, however small, by a contract, which by giving to another an exclusive right of way or in any other manner requires the obligor to refuse to permit the doing of such business on said land by any and all companies, who are willing to pay a just compensation for the land, which may be actually used in the doing of such business.

In *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Ga. 160, 38 Am. Rep. 781, it was expressly decided, that "a contract by a railroad company granting to a telegraph company the exclusive use and occupation of its right of way for telegraph purposes is void as in restraint of trade and against public policy." The court after first showing the public necessity for the telegraph says: "Shall the means then, by which information is transmitted, be monopolized by a contract? When such exclusive rights exist, or such monopolies are established, the same should be done by legislative grant and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple and prevent competition, and they thereby enable the party to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public pol-

icy because they tend to create monopolies and are in general restraint of trade."

The latter words above quoted, "they are in general restraint of trade," may not be entirely accurate language, as the contract prevents the erection of another telegraph line only on the land of the grantors, which may be ever so small a parcel of land. But it is true that to some extent "such contract is in restraint of this telegraphing business"; and for the reasons, which we have given, any restraint of that particular kind of business is contrary to public policy and a prejudice to public interest. The court subsequently say truly: "The State's right of eminent domain extends over every foot of its territory, and the same is held by its owners in subordination to that fixed and coexisting right and may be taken for public uses upon just compensation." Page 784. The inevitable inference from this is, that no one can give to a railroad or a telegraph company the exclusive right of way for a railroad or telegraph line through his land however small a parcel it may be. Such contract is contrary to public policy. And if it were a valid contract, it would defeat the State's right of eminent domain.

The foregoing decision is, as I understand the case, followed in the case of *Western Union Telegraph Co. v. Chicago & Paducah Railroad Co.*, 86 Ill. 246, 29 Am. Rep. 31. There the railroad company had contracted with the telegraph company, that it would furnish and distribute along its track cedar poles, and furnish all the labor necessary to erect the poles and place wires and insulators thereon, and furnish the labor to keep the telegraph wire in repair, the wire, insulators, batteries and instruments and all other material being furnished by the telegraph company, the telegraph company to give the use of new patents. And the railroad company agreed to assure to the telegraph company, so far as it legally might, an exclusive right of way along the railroad line and lands for commercial and public purposes, and agreed to discourage competition by withholding facilities and assistance, performing to competing lines its legal duty and no more. There was proof, which appears to have satisfied the court, that two lines of wire on the same telegraph poles under the management of different companies could not be worked without serious annoyance and inconvenience and injury to each other. The court held, that this contract was valid and could be executed, so far as it prevented the railroad company from permitting another telegraph company from putting up wires on the same poles; but that it was contrary to public policy, if it was to be interpreted as preventing another telegraph company from erecting another line of poles along the railroad and placing on them another line of wires.

If I am right in the views, which I have expressed, it would be contrary to public policy for the owner of a water grist mill to contract with another person the owner of a mill site in the neighborhood, that

he would not erect on it a water grist mill, because the business of grinding corn like that of railroading is regulated by the statute law as one in which the public has a direct interest, and the necessary land may be condemned for the erection of such water grist mill.

We will now proceed to apply these principles of law to the case before us. Examining the contracts between Gale and wife and the West Virginia Transportation Company of date January 31, 1870, and October 25, 1873, the first thing which strikes us is, that while they are for the exclusive right of way and privilege to maintain lines of tubing for the transportation of oil, etc., through this Gale tract, yet these contracts expressly reserve the privilege to remove such tubing at the pleasure of the West Virginia Transportation Company. Now if we were to assume, that a proper contract might be made for such exclusive right of way, we should be compelled to hold, that these were not proper contracts, because of this proviso authorizing the West Virginia Transportation Company to remove at their pleasure this tubing, and of course at their pleasure to decline to transport the oil raised on this "Gale tract" of land. It is true that this does not make these contracts void because of a want of consideration; for the trouble which the West Virginia Transportation Company was at in laying down this tubing would be a sufficient consideration to support these contracts, if they were contracts for such reasonable restraint of trade as that they ought to be supported. ✓ But this provision, that this tubing might be removed at the pleasure of the West Virginia Transportation Company, itself made these contracts unreasonable restraints of trade, so far as the public and the fifty tenants on this "Gale tract" of land were concerned. ✓ The position of the public was, that no one by these contracts could with any convenience transport to market the oil made on this "Gale tract" of land except the West Virginia Transportation Company; and by these contracts they could cease to do so, whenever they pleased, and thereafter, as no one else could lay down tubing, the public would necessarily in a large degree be deprived of the oil, which would otherwise have been produced on this land. Even if a proper contract for this exclusive use of a right of way for such tubing could have been made, this would have made these contracts unreasonable restraints on trade, contrary to public policy and void.

But there are much more serious objections to these contracts than these provisions. And had these obnoxious provisions not been in these contracts, they must still have been held void as contrary to public policy. ✓ The West Virginia Transportation Company could not ask, that the courts should enforce these contracts against Gale and wife, much less against their assignees, because these contracts are void as contrary to public policy. ✓ It is an attempt to restrain trade of a particular form, which from its character is recognized by the statute as such a business as cannot be restrained even partially—a business, in which the general public has such a direct interest, that the statute

has provided, that it may be carried on upon any tract of land in the state without the owner's consent. Hence it follows, that any contract made by the owner intended in any degree to restrain this business is contrary to public policy. This business of transporting oil in tubes is, like railroading and telegraphing, a business recognized by our statute law as one in which the public has so great and direct an interest, that to promote it the statute authorizes the state's right of eminent domain to be exercised by any corporation to acquire a right of way for its tubing through any parcel of land in the state. And from what has been said it must follow, that no person can lawfully contract with any corporation for an exclusive right of way for tubing through his land, whereby oil is to be transported. For if he could, he would thereby defeat the state's right of eminent domain.

Our conclusion therefore is, that such a contract, so far as it confers on the corporation a right of way through the grantors' land is valid and binding on him and on every subsequent assignee or grantee of the land; but so far as it attempts to deprive the grantor or his assignee or any other corporation from exercising the right to lay other tubing through said land for the transportation of oil, such contract is wholly inoperative and void, being contrary to public policy and an unreasonable restraint on trade. I feel confident that I am justified in holding this attempted restraint on the original grantor and covenantor as inoperative and void for this reason and of course, if this be true, it cannot bind any subsequent grantee of the land, or impede any other corporation in acquiring in a legal manner a right of way for the transportation of oil through such land.⁵

The final decree rendered by the circuit court of Ritchie county in this cause dissolving the injunction, which had been awarded the plaintiff, and dismissing the bill and adjudging, that the plaintiff pay to the defendants their costs expended in this suit, is correct and must be affirmed; and the appellees must recover of the appellants their costs about their defence expended and thirty dollars damages.

RICHARDSON v. BUHL.

(Supreme Court of Michigan, 1889. 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.)

This was a suit in equity based on a contract entered into by the parties as a part of their plan to enable the complainant to merge the Richardson Match Company of Detroit in the Diamond Match Company.⁶

⁵ The immunity of persons other than the original covenantors is further discussed in the remainder of the opinion.

⁶ The opinion of a majority of the court turned on the legality of the contract of merger rather than on the questions relating to the contract of the parties preliminary to the merger. Accordingly, only so much of the facts and of the opinions are given as relate to the contract of merger.

SHERWOOD, C. J. In 1879 the Richardson Match Company was located at Detroit. It was organized under the laws of this state, and the complainant owned or controlled all of its stock. * * *

The Diamond Match Company was organized on the 3d day of December, 1880, under the laws of the state of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States. Its object was to monopolize and control the business of making all the friction matches in the country, and to establish the price thereof; and it became necessary to buy many plants which had become established in the business, or were preparing therefor, and all the property used in connection therewith, and to obtain promises from the owners and manufacturers that they would not engage in the business themselves, or indirectly, through others, for 10 or more years thereafter; and, for the purpose of obtaining the control and good will of such factories and their properties, large powers were given by the legislature to the Diamond Match Company when organized, and under the by-laws by which it was controlled. * * *

The Diamond Match Company, in carrying out its purposes, found it necessary, in many instances, to buy a large quantity of useless material, and to pay large and exorbitant prices for the property purchased, which they could not make available; and in many cases in no other way was it possible to purchase the inactivity of manufacturers, and those who intended to enter into the business, and who would otherwise become competitors of the company in the trade. * * *

All corporations and individuals in the country, engaged in the business of making friction matches, desiring or consenting to transfer their property to the Diamond Match Company, did so upon valuations agreed upon, and received their pay therefor in the stock of the Diamond Match Company at par, and gave a bond to the company of the tenor and effect of that given by the Richardson Match Company when it entered the company, a copy of the condition of which reads as follows:

"And the Richardson Match Co., hereby covenant and agree to and with the said the Diamond Match Company, that it shall not and will not at any time or times, within twenty years from the date hereof, directly or indirectly engage in the manufacture or sale of friction matches, and that it will not aid, assist, or encourage any one else in said business, in the state of Michigan or anywhere else, where its doing so may conflict with the business and interests, or diminish the sales, or lessen the profits, of the Diamond Match Co.; and it is understood by it that the above covenant not to engage in the match business is a valuable and influencing consideration, without which the Diamond Match Company would not have purchased the above property; and for the true and faithful performance of said covenant it hereby binds itself, its successors and assigns, heirs, executors, and

administrators, unto the said the Diamond Match Company in the sum of fifty thousand dollars, to be recovered and paid as and for liquidated damages." Mr. Richardson's individual bond is in substantially the same form, in a penalty of \$25,000.

Each proprietor subscribed for a certain amount of preferred stock, which he paid for by transferring to the company such matches and match materials as he or it had on hand, when they entered the company, at an appraised value, and, if this was insufficient to pay for such stock, the balance was paid in cash; but common stock was paid for all real estate, machinery, patents, good will, bonds to stay out of the business, and all other property transferred to the company at the valuation agreed upon when the proprietor or proprietors came into the company, except matches and match materials, for which preferred stock was issued. Under the arrangement by which any party sold and conveyed a match factory or other property to the company, he was to buy at its par value one-half as much preferred stock as he had received in common stock for his property. This was intended as the working capital for the new company, and every person who conveyed property to the company was obliged to give to the company a bond, such as is hereinbefore mentioned.

Under the policy above stated, through the energy of its officers and managers, the Diamond Match Company succeeded in securing control, substantially of all the factories in the country, with their several properties, and the owners thereof were brought under its dictation, and the great monopoly became complete, and, as was expected by its proprietors, the gains realized by the company were enormous.

* * *

When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and it is usually the first point to which the attention of the court is challenged by counsel; but in this case, when, upon the argument, attention was called to this feature of the case, it was allowed to pass by counsel upon both sides without discussion. I have therefore expressed my views of the case as presented by the parties, and will now pass to the question which it is not needful for counsel to present in order to secure the action of this court in disposing of the same.

I think no one can read the contract in question,⁷ and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The busi-

⁷ I. e., the contract of the parties preliminary to the merger.

ness in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people. The article thus completely under their control for the last 50 years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country.

It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, and in carrying out its object, that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of mer-

chandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts.

In my judgment, not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should be reversed, and the complainant's bill dismissed, with costs.

CHAMPLIN, J. I concur with the Chief Justice in dismissing the bill of complaint, for reasons which render it unnecessary to discuss the merits of the controversy between the parties.

It appears from the testimony that the Diamond Match Company was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement, by which the manufacture and output of all the match factories should be controlled by the Diamond Match Company. Those manufacturers who would not enter into the scheme were to be bought out, those who proposed to engage in the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented, if possible. All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist nor encourage any one else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. These restrictions varied in individual cases as to the time it was to continue, from 10 to 20 years. Thirty-one manufacturers, being, substantially, all the factories where matches were made in the United States, either went into the combination, or were purchased by the Diamond Match Company, and out of this number all were closed except about 13.

Gen. Alger was a witness in the case, and was asked by his counsel the following question: "Question. It appears that during the years 1881 and 1882 large sums of money were expended to keep men out of the match business, remove competition, buy machinery and patents, and in some instances purchase other match factories. I will ask you to state the reasons, if any there are, why those sums should not be treated as an expense of the business, and charged off from this account?" To which he replied: "Answer. Because the price of matches was kept up to correspond, so as to pay these expenses, and make large dividends above what could have been made had those factories been in the market to compete with the business." It also appears from the testimony of Gen. Alger that the organization of the Diamond Match Company was in a measure due to his exertions.

There is no doubt that all the parties to this suit were active participants in perfecting the combination called "The Diamond Match Company," and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Coal Co. v. Coal Co.*, 68 Pa. St. 186; *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Hoffman v. Brooks*, 11 Week. Cin. Law Bul. 258; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51.

It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344; and see *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Piatt v. Oliver*, 1 McLean, 300, 2 McLean, 277; *Stanton v. Allen*, 5 Denio, 434. It is not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.⁸

TRENTON POTTERIES CO. v. OLYPHANT.

(Court of Errors and Appeals of New Jersey, 1899. 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612.)

[The facts and a part of the opinion in this case are printed ante, p. 118.]

MAGIE, C. J. It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned Vice Chancellor held them to be opposed to the public interest, because he conceived that they tended to creat a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simultaneously with its purchase from respondents, also purchased four other plants

⁸ The opinion of Long, J., concurring on other grounds, is omitted.

used in the manufacture of such ware in Trenton, and the property, business, and good will of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be part of a scheme to control the production, distribution, and sale of sanitary pottery ware, and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life. The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the American Sanitary Potters' Association. That association had in some way controlled the prices at which such ware were produced by its eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action of the association. After appellant's purchases, prices were so controlled for some time, and until the association fell to pieces.

Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are, without doubt, opposed to public policy. The contract of the Sanitary Potters' Association in this regard was inimical to public interest when respondents were members of it, and none the less so when appellants acquired the property of five of its members. However solemnly the members of that association may have obligated themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements, or awarded damages for any breach of them. But the contracts by which appellant acquired the property and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association, or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply

protected by invalidating the agreement of the association for the control of prices, and the disconnected agreement of sale would be enforced as other contracts.

It is further urged that the simultaneous contracts procured by appellant create or tend to create a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time, and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade, nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture?

It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form. Whether sanitary pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work, a single workman in that industry. They restrain a comparatively small number of capitalists, who had previously employed their capital in such manufacture, from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture.

There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction, when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains. The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition.

But appellant is a corporation, and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The Legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the Legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time, at least, destroy, competition. Contracts for such purchases cannot be refused enforcement.

Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforceable, although, as a result thereof, competi-

tion is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased cannot be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them. The result is that the decree appealed from must be affirmed as to Richard C. and Henry D. Olyphant, but as to the other respondents it must be reversed, and a decree be made enjoining them, according to the prayer of the bill, within the state of New Jersey.

LIPPINCOTT and HENDRICKSON, JJ., dissent.

OAKDALE MFG. CO. v. GARST.

(Supreme Court of Rhode Island, 1894. 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784.)

Bill in equity by the Oakdale Manufacturing Company and others against Sebastian Garst for an injunction to restrain the defendant from carrying on business in violation of the following agreement: "And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage, directly or indirectly, in any business of the same kind, or for the same purpose or purposes, as that to be carried on by the corporation to be formed; nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation, or corporations engaged in the same business or business similar to the business of the corporation to be formed for the period of five years from and after the date of this agreement." The complainant the Oakdale Manufacturing Company is the corporation organized by the other parties to the suit, under the laws of the state of Kentucky, in pursuance of the agreement referred to in the opinion of the court.

STINESS, J. The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts and good will of their respective concerns, at a valuation greatly in excess of the value of the property itself, taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time.

In August, 1892, the defendant sold his stock in the company, to present holders, for \$60,000, although, as he says, the property it represented was worth only about \$28,000. After this he entered the same business again, and claims the right to do so upon the following grounds, viz.: (1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; (2) that the contract is void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition; (3) that one purpose of the contract was to form a corporation in violation of the laws of this state; (4) that, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the court of appeals (121 N. Y. 582, 24 N. E. 834) the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; and *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660—were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration.

But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence

are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. [Citing and reviewing *Skrainka v. Scharinghausen*, 8 Mo. App. 522, and *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469.]

Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up. *Chafee v. Manufacturing Co.*, 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court. *Bank v. Kendall*, 7 R. I. 77; *Machine Co. v. York*, 11 R. I. 388; *Smelting Co. v. Smith*, 13 R. I. 27; *Manufacturing Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity. *Pierce v. Crompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, c. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of

universality of time (*French v. Parker*, 16 R. I. 219, 14 Atl. 870), nor of space (*Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in *Wiley v. Baumgarden*, 97 Ind. 66, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry-goods business for five years; and in *Herreshoff v. Boutineau* the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in *Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861, where the business was extensive, restraint within the entire territory of the United States, and in *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, unlimited restraint as to territory, were sustained.

The contract is to be determined by its subject-matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable.

We think the complainants are entitled to the relief prayed for.

ANDERSON v. SHAWNEE COMPRESS CO.

(Supreme Court of Oklahoma, 1906. 17 Okl. 231, 87 Pac. 315, 15 L. R. A. [N. S.] 846.)

Action by Neil P. Anderson and others against the Shawnee Compress Company and others. Judgment for defendants, and plaintiffs bring error.

This action was commenced on May 2, 1905, in the district court of Pottawatomie county, Okl., by the plaintiffs in error against the defendants in error, the purpose being to enjoin the execution of a certain lease contract by the Shawnee Compress Company, its officers and agents, to the Gulf Compress Company, defendants in error herein.⁹ An amended petition was filed on May 13, 1905, to which a demurrer was presented and overruled. Thereupon defendants below filed an answer, which contained a general denial coupled with certain admissions and explanatory matter. Plaintiffs below demurred to this answer, and on said demurrer being overruled, filed a general denial as reply. * * * The action was tried to the court, and resulted, on September 20, 1905, in judgment for defendants below, dissolving the temporary injunction, dismissing plaintiffs' amended petition, and taxing the costs of said action to plaintiffs. Motion for new trial was filed and overruled, and this proceeding in error was thereupon commenced, to review the action of the court below.

The lease, the execution of which is sought to be enjoined, denominated the Shawnee Compress Company as the "landlord," and the Gulf Compress Company as the "tenant." After making provision for the leasing of all the personalty belonging to said Shawnee Company, specifying the period to be five years, the rental \$6,000 per annum, and covering various other items, such as repairs, damage by fire, flood, etc., providing for the itemizing of the leased property, etc., the contract contains the following language: "(6) The landlord shall not, during the term of this lease, without the consent of the tenant, directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the tenant. * * * (10) The landlord agrees and pledges the tenant its good will, moral and real support, and that it, individually and collectively, will render the tenant every assistance in discouraging unreasonable and unnecessary competition. * * * The tenant further agrees to in no way use its other compresses to the detriment of the Shawnee Compress during the term of this lease."

It further appears from the evidence at the trial that C. C. Hanson is the president of both the Atlanta Compress Company and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated in the lease in question; that the Atlanta Compress Company operates in the states of Alabama, Georgia, and Florida, and was

⁹ Parts of the statement of facts and of the opinion are omitted.

organized and is owned and controlled solely by the carriers for their benefit; that the board of directors and stockholders of said corporation are composed entirely of railroad officials; that the Atlanta Company controls the operation of 25 plants; that the Gulf Compress Company is a close corporation, chartered in Mobile, Ala., and operating in the states of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory, and Oklahoma, and controlling the operation of 27 compresses in those states, located at various points therein; that none of the Gulf Company's plants and the Atlanta Company's compresses are operated at the same points.

It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was \$25,000, but that it has, within the past year, been increased to \$1,000,000, of which \$600,000 is treasury stock; that its field of operation has been rapidly extended from Alabama to all the cotton growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and as testified to by its president, is "prepared to buy or lease, whichever proposition suits us best." It appears from the evidence that the negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shawnee plant was in pursuance of an effort to avoid, "directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition." It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff; that tariffs for the hauling of cotton are established by the railroads as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district.

PANCOAST, J. * * * Does the contract, or so much thereof as is set out above, tend to the unlawful restriction of competition in the business it concerns, and thereby furnish an illegal monopoly of said business in the cotton growing communities, and this, in contemplation of the character of the transactions out of which the contract grew, the plan and mode of operation of the business of the purchasing or leasing company, and the objects or results accomplished, if not in fact intended or sought to be brought about? When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and is usually the first point to which the attention of the court is challenged by counsel. In construing the instrument here, as well said by Mr. Justice Bradley, in *Oregon Steam Navigation Company v. Windsor*, 20 Wall. (U. S.) 64-68, 22 L. Ed. 315, it must be "judged according to the circumstances, and can only be rightly judged when the reasons and grounds of the rule of construction of such contracts are carefully considered."

The public welfare is the first consideration to which the courts will

look, and then the question of whether the restraint upon the one party is or is not greater than the protection of the other requires. It is now the general holding that when one engaged in any business or occupation sells out his stock in trade and good will, he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and this is about as far as contracts in restraint of trade have been upheld by the court in this country or in England. But when, by the principal operation of any contract, it encroaches upon the rights of the public and transgresses the liberty of free competition, consideration then for the public welfare and for society becomes paramount, and must predominate over any individual right to contract. It is immaterial in determining the legality of such contracts whether or not it was entered into with any evil intent, but the material consideration is its injurious tendency, and the power thereby given to control prices. Nor, in order to vitiate a contract, is it essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages derived from free competition.

No one can read the contract in the case at bar, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Gulf Compress Company and its allied corporation, the Atlanta Compress Company; and that this object is to prevent competition in the compression of cotton throughout the cotton producing states cannot reasonably be doubted. Circumstances so strong that it is impossible not to give this interpretation to them point unerringly to this conclusion. It crops out time and again both in the language used during the negotiations for the lease of the Shawnee Compress Company's plant and in the contract itself, and in the testimony introduced on the trial below. True, the language is guarded, the parties are circumspect; it is only sought to "discourage unnecessary and unreasonable competition," but such language is to be taken and construed in the light of the actions of the parties, and in view of the attendant circumstances.

The Gulf Compress Company is in the business of compressing cotton for hire. Its field of operation is as broad as language can make it. Its capital is \$1,000,000, of which six-tenths or \$600,000 remains in the treasury in the shape of treasury stock, the form most convenient, most immediately available for instant application. Its capital has within the past 18 months been increased from \$25,000, to an amount sufficient to buy or otherwise absorb almost all, if not the entire business of cotton compression conducted in the United States. It, with the Atlanta Company now controls the operation of 52 compresses, out of which it owns but 6, holding the remainder by lease contracts, as testified to by the president of both companies, similar to that under consideration here. The officers of neither of these companies have seen fit to declare a single dividend since their incorporation, but the

surplus earnings of both companies are held in the corporation vaults, for the very purpose, as we may well infer from the surrounding circumstances, of increasing its holdings of such properties under like contracts, in furtherance of a general policy to absorb the entire business of compression of this commodity.

The real, the veritable purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of organization and mode of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them, is, beyond reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers in their cotton tariffs. Within certain boundaries, the haul must be one certain way, and when the Gulf Company seizes the strategic point, under its leases, competition within that district is annihilated. If it be true, as declared upon the witness stand by its president, that such is not the purpose of this organization, then the intention of its officers, as evinced in the declarations which fall from their lips, is at wide variance from the purposes evidenced by the results they have brought about.

Nowhere by the terms of the contract we are construing is the Gulf Compress Company obligated to continue the Shawnee plant in operation as an active factor in the cotton compress business. Its machinery might lie idle, its industry cease, for all the contract obligates them to the contrary. The territory within which the restriction on the Shawnee Company is to operate is practically unlimited. True, the agreement is that it "shall not directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the Tenant," but, under this clause, the Gulf Company may establish a compress at any competitive point it pleases, and thereby wholly extinguish competition through those companies bound by its leases; and if with a few, why not with all, until the logical outcome is the establishment of a monopoly of that business throughout the cotton producing area, the closing of every avenue to competition, under leases identical with that under consideration here.

The cases cited by counsel for the defendants in error do not sustain the doctrine contended for by them. This case does not fall within that class of cases, where contracts have been upheld, though the parties, by the contract, were restrained from carrying on the same business for a particular length of time and within a designated territory, but is one of that class which depend for their validity upon the situation of the parties, the nature of the business, the interests touched by the restrictions, and the effect of the contract upon the rights and welfare of the public. Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook, and more onerous in its intent than is necessary to afford a fair protection to the lessee. And tested by the same principles, be-

cause of the considerations hereinbefore mentioned, it is equally clear that the obligation is in general restraint of trade, opposed to public policy, and pursued to its logical outcome, tends necessarily to the establishment of a monopoly, and is therefore, to that extent, void.

We have examined numerous decisions in the investigation of this subject, and believe that the conclusion we have reached is the one most closely following the trend of modern authority, and in entire accord with the latest judicial expressions and enunciations of the principles governing such contracts. In our judgment, not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade, and against public policy [citing cases].

In the case of *Field Cordage Co. v. Nat. Cordage Co.*, 6 Ohio Cir. Ct. R. 615, a lease for a term of years was made by a manufacturing company of the machinery in the mill of another like company, together with the latter's good will, but the lease failed to make provision for the operation of the mill where situated, and such lease was held void as in restraint of trade. The case of *Richardson v. Buhl et al.*, above cited [77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457], involved the consideration of a contract for the purchase of the entire property of a manufacturer of matches, it being the policy of the purchasing company to exact from every seller a bond that such manufacturer would not for a term of years engage in or aid any one else in the manufacture of matches, "in any place where such action might conflict with the interests or diminish the sales, or lessen the profits of the purchasing corporation," and in an exhaustive opinion, Sherwood, C. J., held that such contract was "unlawful and against public policy, the object being to prevent competition and control the price of an article of necessity."

The contract construed in the case of *Thomas v. Adm'r of Wm. Miles*, supra [3 Ohio St. 275], was similar in its provisions to the one at bar, the seller binding himself "not to enter into nor be concerned in the kind of business which has heretofore been conducted or carried on by the said firm, or any branch thereof, within the city of Cincinnati and shall not in any way interfere with any agency established by said firm, whether such agencies shall be located in Cincinnati or elsewhere," and upon appeal such contract was held to be "clearly opposed to public policy and therefore void." Again in the case of *Dodge Stationery Co. v. Dodge*, supra [145 Cal. 380, 78 Pac. 879], under a statute almost identical with ours, excepting from the general operation of the law as to contracts in restraint of trade those concerning the selling of good will of the business, it was held that a contract by a vendor of stock in a corporation, binding him not to engage in the line of business conducted by the corporation, is void. And that occurs in the case at bar, since by the terms of the contract, the Shawnee Com-

press Company, and its officers "individually and collectively" bound themselves not to engage in the compress business in a territory practically unlimited [citing cases].

In view of the evidence in the record before us, we cannot judicially determine that any portion of the lease contract involved in the case at bar would unquestionably have been entered into, regardless of the two provisions hereinbefore quoted, and herein held unlawful; hence, the entire contract must fall. *Western Wooden Ware Ass'n v. Starkey et al.* (Mich.) 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Bishop v. Palmer*, 16 N. E. (Mass.) 299, 4 Am. St. Rep. 339; *Wilson's Ann. Sts.* § 767. In view, then, of the evident purposes of the leasing company, as indicated by its plan of organization, its abundant available treasury stock, its control, together with the Atlanta Company, of 52 compresses scattered at various points over the Southern states, the area affected, the unlimited operation of the restraining clause, the general situation and the interests concerned, considerations of public welfare and regard for the public interests in the communities affected, require us to hold that this lease is wider in scope and more restrictive in operation than necessary for the proper protection of the Gulf Compress Company in its lease, and being executed in furtherance of a monopolistic design inimical to the best interests of the public is in unreasonable restraint of trade and therefore void.¹⁰

DARIUS COLE TRANSP. CO. v. WHITE STAR LINE.

(Circuit Court of Appeals of the United States, 1911. 186 Fed. 63, 108 C. C. A. 165.)

KNAPPEN, Circuit Judge. This is an appeal from a decree dismissing the libel filed by appellant for the recovery of two installments of rent upon a lease of the steamer *Idlewild*; the decree being based upon the ground that the contract of lease was void as being in restraint of trade under the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The lease was made March 8, 1900, for a term of three years, at an annual rental of \$13,000, with a provision for the substitution (without additional rental), during a portion of the season, of the steamer *Arundell*, owned by appellant, and then engaged during a short season in navigating Lake Ontario, and with further provision for the use of the *Arundell* by appellee (in connection with the *Idlewild*) for another portion of the season, at the option of appellant at an added rental. The *Idlewild* was to be run "as a passenger and packet freight steamboat between Port Huron and Detroit, Michigan, and Toledo, Ohio, and upon any portion of said route," and in connection with the lessee's "other

¹⁰ Affirmed in *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865 (1908).

steamers in the passenger and packet freight business on the river and lakes between Port Huron, Michigan, and Toledo, Ohio." By the eleventh paragraph of the charter the lessor "agrees to surrender to the party of the second part all of the good will of the 'river business,' so-called, that may be controlled by it, and to that end agrees not to enter into competition with the party of the second part upon the routes herein named, and not to operate any of its vessels or any vessel whatsoever on the said routes between Detroit and Port Huron or between Detroit and Toledo during the period of the said three years."

It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within the federal anti-trust law. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428; *Fisheries Co. v. Lennen (C. C.)* 116 Fed. 217; *Davis v. A. Booth & Co. (6th Circuit)* 131 Fed. 31, 65 C. C. A. 269.

On the other hand, it is equally well settled that the federal anti-trust law forbids every contract, combination, or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 299; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 619, 620, 53 C. C. A. 256, 265, 266; *Clark v. Needham*, 125 Mich. 84, 85, 87, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559. See, also, cases cited in *Bigelow v. Calumet & Hecla Min. Co. (C. C.)* 155 Fed. 869, 874.

The determination of this case must therefore turn upon the answer to the question whether the restraint imposed was merely incidental to the lease, or whether, on the other hand, the lease was a device to control interstate commerce; in other words, upon the dominant purpose of the parties in making the lease. This is a question of fact, to be determined from all the circumstances of the case. The question as presented here is in some respects novel, and is not entirely easy of solution. The oral evidence was taken in open court, and consisted of the testimony of the representatives of the respective parties who, on behalf of their principals, negotiated the lease in question. Upon a careful consideration of this testimony, in connection with the documentary evidence, and giving due consideration to the opportunity possessed by the trial judge to determine the weight to be given the testimony of the witnesses, we are disposed to agree with

the conclusion reached by the court below, that the agreement violates the federal anti-trust law. Among the important considerations which lead to this conclusion are these:

For twelve years previous to the making of the lease in question a monopoly of river and lake transportation between the points named in the charter party in question had been maintained under a pooling arrangement between the owners of the respective lines of boats, including the parties to this litigation, with the exception of one year, during which there was a division of territory. During the years 1897, 1898, and 1899 there were four companies in the pool. By the time this pooling arrangement expired, two of the four parties had disposed of their interests to the other two, who became the parties to the 1900 arrangement in question, the libellant having made a sale on credit of one of its boats and the respondent having acquired a third boat. The arrangement of 1897 to 1899 was held by the Supreme Court of Michigan, in a suit brought by appellee here against the remaining parties to the agreement, for contribution on account of a recovery for personal injuries, to be an unlawful combination under the federal anti-trust law. *White Star Line v. Star Line of Steamers et al.*, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551.

It is conceded here that the agreement of 1897 to 1899 was in violation of that law, and it is apparent that the object of the arrangement for the entire period between 1888 and 1899 was a monopoly of the traffic in question. We cannot regard this fact as immaterial in arriving at a determination of the dominant purpose of the parties in making the lease. In our opinion the previous relations of the parties, while not necessarily controlling, furnish a valuable sidelight upon the purpose of the agreement here in question. The case before us must be determined upon its own peculiar facts. The District Judge seems to have reached the conclusion that the object of the appellee in chartering the *Idlewild* was to eliminate appellant's competition, and that in making the charter he "aimed at the same control of the traffic which he had before," and that the appellant entered into the contract with the knowledge of its purpose and effect as restraining competition. The charter for the years 1900 to 1902, which is before us, produced the result accomplished by the arrangements between 1888 and 1899 and was intended to do so.

The District Judge found as a fact that the rentals paid for the use of the *Idlewild* were greatly in excess of the earnings of that steamer. We think the testimony sustains that conclusion. While there is some conflict of testimony, we think it a reasonable deduction that the annual rental fixed was practically an average of the annual earnings of the *Idlewild* during the twelve years' existence of the pooling arrangement, and that this amount was about \$4,000 greater per year than the *Idlewild* was able to earn, except as her share of the earnings under a practically complete monopoly of this traffic. Indeed, the appellee's manager testified: "From an earning standpoint, in the hands

of anybody, she (the Idlewild) perhaps was worth only \$9,000, but in our hands and to do away with opposition, she was worth \$13,000 to us."

It is urged that the Idlewild could not have competed with the appellant's three boats, and that the former must therefore, had this lease not been made, have remained out of commission. But we are not satisfied that such is the case. Indeed, as we understand the record, appellant's manager conceded that he might have used the Idlewild on the route between Detroit and Toledo; and it is by no means clear that appellant would have experienced any difficulty in supplementing the Idlewild with another boat, if necessary to maintain competition. There is also evidence that appellant's manager had, or claimed to have, such competition in mind if the lease in question were not made.

If it was the dominant purpose of both parties, when making the lease, to preserve the monopoly which they had participated in creating, and in maintaining for a period of years, the contract was, in our judgment, none the less invalid, from the fact that the lessor, instead of receiving for the use of the boat a share of the profits of a pool, obtained as annual rental an amount which experience in the pool showed was the average annual earnings assigned to the boat in question—an amount materially larger than the boat could have itself earned while operated under the lease.

This must be so unless we are prepared to hold that a combination made for the purpose of maintaining a monopoly is made lawful by the fact that the rental of one of the boats used in the combination was fixed in amount. Can it make any difference with the result that the lessor did not propose the insertion of stipulations against competition, if he knew that the object of the lessee was to effect a continuance of the monopoly which had been maintained by the participation of the parties up to that time, and that such would be its effect, and approved of such result, knowing that it, as lessor, was receiving a rental which could only be paid because of the securing of such monopoly?

In view of the circumstances which have been just stated, did the form the transaction took make it any less a contract in restraint of trade? Should not in such case the dominant purpose of both parties be held to be to restrain commerce?

In *United States v. Trans-Missouri Freight Ass'n* and in *United States v. Joint Traffic Ass'n*, *supra*, is found language sustaining the inference that a lease and sale stand upon the same basis. It must be conceded that there is no necessary difference between rules pertaining to sales and leases. It seems obvious, however, that a lessor may have a greater interest in creating and maintaining a monopoly than a vendor from the fact that on the termination of the lease the lessor, as the owner of boats suitable for the traffic in question, would be interested in the existence of as little competition as possible. The fact

that, as we understand the record, appellant did engage in the river and lake traffic in question, upon the expiration of the charter under consideration, lends color to the view that it was to appellant's interest to maintain the same arrangement in which it had participated during the years previous to the charter in question. The fact that the parties did not renew their arrangement on the expiration of this charter is not significant, for by the time it had expired the parties were in litigation, first, in the suit in the state court referred to, and, second, by the institution of the present suit for rental under the charter in question here—in which cases the reciprocal defenses were made that the respective agreements were in contravention of the federal statutes. It is to be noted, as of some pertinency, that by the fifth paragraph of the lease appellee specifically agreed that the leased boat should be operated in connection with his other steamers over the same routes which had been so controlled by the parties for many years preceding.

The theory on which stipulations against competition in connection with bona fide sales have been held not to violate the federal anti-trust law is that such restraint is no greater than required for the protection of the legitimate interests of the vendee, and that such restraint is therefore merely incidental to the main purpose, to wit, the sale and purchase. See *United States v. Trans-Missouri Freight Ass'n*; *United States v. Joint Traffic Ass'n*; *Bement v. National Harrow Co.*; *Cincinnati Packet Co. v. Bay*; *Davis v. A. Booth & Co.*, heretofore cited.

On the other hand, if the restraint imposed is greater than necessary to afford a fair protection to the legitimate interests of a vendee or lessee, the contract is rendered void. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 425, 28 Sup. Ct. 572, 52 L. Ed. 865. The same test has been recognized by this court in several cases under the common law, including *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80; *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536; *Prame v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374.

Can this test apply, that is to say, can the lessee be said to have legitimate interests to protect, when his dominant purpose in taking the lease, and which is approved by the lessor, is to continue a monopoly which both have participated in creating and maintaining? We are constrained to the opinion that the district judge did not err in holding the agreement unlawful.

It is urged that, even if the agreement in relation to the interstate commerce route between Detroit and Toledo is void, the remainder of the contract may be enforced as valid. There is in our judgment no force in this contention. The contract is entire and indivisible. The only use which respondent had of the *Idlewild* was under the contract, and that being void, and no basis existing for an apportioning of earnings under the interstate route from those earned wholly

within the state, and thus no means of separating the legal from the illegal provision, it follows that no recovery can be had.

SEVERENS, Circuit Judge (dissenting). In my opinion the judgment proposed by the majority of the court is erroneous; and, as the subject is one of much interest to the business public, and my conviction is so positive that the decision is not in accordance with the settled interpretation of the Sherman Act, I think it my duty to record my dissent and state the reasons for it.

I assume as a postulate that the act is not intended to prohibit that class of contracts so long sanctioned, whereby the owner of property or business, for a valuable consideration, conveys it, or some valuable interest in it, to another, and at the same time and for the same consideration agrees not to do anything which shall tend to diminish the value of the subject-matter of his conveyance, whether it be of a business or of some specific real or personal property.

A lease of a vessel for employment on a certain specified route on which the owner has hitherto employed it is a proper contract in which such a stipulation may be made. The contract which these parties made is not obnoxious to the provisions of the act referred to. It is not affected by the circumstance that these parties had before that time been in a combination with other parties which was, and had been adjudged to be, illegal. As to any new agreement, they had the same capacity and privilege as other people to make contracts concerning their property and business. Whether such new contract offends the law depends upon its stipulations. If they are not unlawful and their due performance is not unduly prejudicial to the public, they cannot be impeached by suspicion or even proof that the parties intended something wrong so long as that proof does not go to any act or fact extraneous to the contract. Intentions do not count in business transactions unless they are carried into effect by a contract.

Judge Andrews in the course of an elaborate opinion upon this subject, delivered in the case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, said: "We are not aware of any rule of law which makes the motive of the covenantor the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

And this defendant is not claiming that there was any stipulation outside the contract which made it other than what it purports to be. On the contrary, the defendant plants its defense upon the contract itself and in its answer to the libel sets it up as a valid defense. There is no suggestion of any extraneous stipulation which by its association with the contract would make it unlawful. It is true the answer sets up the previous unlawful combination, and how it was denounced by the Supreme Court of the state. And then the defendant attempts

to carry the taint of that transaction over into the new contract and so infect it with the same illegality. Upon what legal inference or logic this result is accomplished is not apparent. In the court below witnesses were called and testified about what seems to me to be irrelevant and immaterial subjects; and stress is laid upon the circumstance that the District Judge saw the witnesses and heard them testify. But I cannot help thinking, with all due respect to the opinion of my associates, that the oral testimony adduced at the hearing in the court below was of no legal significance, both because there was no pleading which raised any issue beyond that which the reference to the contract itself and the earlier combination presented, but because the testimony referred to does not tend to show that anything more than the due performance of the contract was at any time agreed to be done, or ever was done.

Turning again to the instrument itself, the only point raised in the argument made to show that the parties agreed to do something which would be in violation of the Sherman act is that the sum agreed to be paid for the use of the vessel considerably exceeded the fair rental value of the use. This is supposed to give ground for suspicion. But what evil object the suspicion rests upon is not so "bodied forth" as to be discernible. Besides, it is the ordinary and expected thing in such cases that the vendee will pay more than the value of the principal subject of the contract, and that some part of the consideration goes for the ancillary stipulation. The defendant in its answer to the libel very properly puts the matter thus: "That the rental price agreed to be paid for the steamers *Idlewild* and *Arundell* was largely in excess of their real rental value, and that the same was agreed to be paid in consideration of the undertaking of the libellant not to enter into competition with the defendant upon said route during the period of said contract."

Just what the Sherman act means by the term "monopolizing" is not yet settled, and it may be that it will have to be done by the processes of inclusion and exclusion. But it already seems safe enough to say that it does not include such a result as a man may attain by his own endeavor and without the suppression of competition other than such as inures to him through the ancillary stipulations of a lawful contract, such as these. There is no forbidden monopolizing in this, nor any undue restraint of trade. There was here no agreement to bring other parties into a combination, or to induce them not to enter into competition. There was no stipulation that the lessor should have any interest in the proceeds of the business which it was expected would be carried on by the lessee; nor was there any sort of combination in the enterprise. If the lessor had sold the vessel outright, and had stipulated not to compete in the business in which she was to be employed, it would have been the common case in which such ancillary stipulations have been adjudged to be lawful. Here the vessel was leased for a term of years, and the restraint which the

lessor put upon itself was for the same period. All the vessels on the Great Lakes which then were or might be built and be capable of such service were as free as ever to ply the business of carriers of passengers and freight between these ports.

The defendant naively avows in its answer and makes oath that at the time when it made this contract it was advised and believed that it was valid and binding. And upon such a pledge of its sincerity we may properly assume that during the years when it was using the vessel it held to the same faith. Otherwise it would have abandoned the contract and restored the vessel to its owner. It was not until pay day arrived that it was able to see things in what it now thinks is the proper light. I do not mean to say that it is not permissible in law for a party to alter his position in this way and in circumstances where the law permits it on grounds of public policy, but the conditions are recited to indicate the duty of the court to put such a construction upon the contract and give it such effect as will make it valid and obligatory if such construction is fairly possible.

In my opinion the public interest was not impaired in any way which would render the contract obnoxious to the prohibitions of the Sherman act; and I cannot help thinking that a decision to the contrary would be opposed to the settled law, and if followed would render the making of any of this kind of contracts practically impossible, and must think that the public interest would be better served by compelling the defendant to perform its agreement.

MOREHEAD CITY SEA FOOD CO., Inc., v. WAY.

(Supreme Court of North Carolina, 1915. 169 N. C. 679, 86 S. E. 603.)

Action by the Morehead City Sea Food Company, Incorporated, against B. C. Way. From an order continuing an injunction, defendant appeals.

This is an action to restrain the defendant from engaging in the business of a fish dealer in Morehead City in violation of an agreement whereby the defendant agreed with the plaintiff, upon the plaintiff's purchasing his business, good will, and certain personal property, not to carry on, be concerned in, or interested in said business of a fish dealer for a period of ten years within 100 miles of Morehead City. The plaintiff was duly organized on the 14th of March, 1914, and the defendant, one of the incorporators, was elected a director, vice president, and general manager of the plaintiff, and he has continued in these positions up to the commencement of this action.

Prior to the 14th of March, 1914, the fish business of Morehead City was conducted by seven different firms composed of eleven individuals. These fish dealers operated boats about the waters of North Carolina, and did a large fish business in North Carolina, South

Carolina, Georgia, and in Northern and Eastern markets. They were the only fish dealers at Morehead City, except two, but there are now since the organization of the plaintiff as many fish dealers in Morehead City as there were at the time of the organization of the plaintiff. On the 12th of March, 1914, all of said eleven fish dealers formed the plaintiff corporation, known as Morehead Sea Food Company, and upon the organization of the company each entered into a contract of sale with the plaintiff by which he sold his business and good will as a fish dealer to the plaintiff and the personal property used in connection with his business, and in each bill of sale there was the following covenant:

"The vendor hereby covenants with the purchaser that they will not directly, indirectly, solely, or jointly, as principal, agent, manager, or otherwise, be concerned or interested in the same business heretofore carried on as aforesaid by them within the counties of Carteret and Craven, in the state of North Carolina, and within 100 miles from the town of Morehead City aforesaid, for ten years from the date hereof, nor permit their names to be used in connection with such business."

Upon the hearing of the motion to dissolve the restraining order therefore issued his honor continued the order to the hearing, and the defendant excepted and appealed.

ALLEN, J. (after stating the facts as above). Two questions are presented by the appeal:

(1) Is the agreement entered into between the plaintiff and the defendant a violation of the statute of this state enacted to prevent illegal trusts and combinations in restraint of trade?

(2) If not, is the agreement unlawful under the common law?

The first question is answered by the statute (chapter 41, § 5, subsec. F, Public Laws 1913) wherein it is provided:

"That nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law."

The contract under consideration comes within the class described in the statute, and is authorized by it, unless condemned by the common law.

We must then examine the principles of the common law applicable to contracts of this character.¹¹

In other words, the good will of a business being recognized as intangible property which the owner may sell, and it being for the benefit of the seller that it should be sold for its full value, and it being necessary for the protection of the purchaser that the seller should not after the sale enter into competition with him, contracts restraining the

¹¹ An extended review of the authorities is omitted.

seller from engaging in the same business are upheld, and they are not unreasonable if they go no further than to remove the danger to the purchaser of competition with the seller. [Here follows an extended review of *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403.]

Our court has announced the same principle in *Cowan v. Fairbrother*, 118 N. C. 412, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733; *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; and in *Shute v. Heath*, 131 N. C. 282, 42 S. E. 704.

The court said, in the * * * third [of these cases]:

"Contracts in partial restraint of trade can be made and enforced of common right. This court said in *Kramer v. Old*, 119 N. C. 1 [25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650]: 'The modern doctrine is founded upon the basic principles that one who, by his skill and industry, builds up a business, acquires a property at least in the good will of his patrons, which is the product of his own efforts, and has the fundamental right to dispose of the fruit of his own labor, subject only to such restrictions as are imposed for the protection of society, either by express enactments of law or by public policy.' An indefinite restriction as to duration will not make such contract void. *Kramer v. Old*, supra. But there must be a definite limitation as to space; and the reasonableness of such limitation will depend upon the nature of the business and good will sold. A contract, for instance, for a valid consideration not to engage in the manufacture and sale of firearms in general use, would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton. * * * And the test of that reasonableness is whether the space or territory is greater than is necessary to enable the assignee to protect himself from competition on the part of the assignor, and thereby to get the benefit of what he has bought."

Applying these principles, we are of opinion that the contract is not illegal, as it is limited as to time, ten years, and it is not coextensive with the territory in which the defendant could enter into competition with the plaintiff, as the territory embraced in the contract is 100 miles from Morehead City, and the field of competition extends to South Carolina, Georgia, and the Northern and Eastern markets. It also appears that the plaintiff has not attempted to prevent others from engaging in the same business, and that the public has not been deprived of the benefit of competition, as there are as many persons doing business as fish dealers in Morehead City now as at the time of the organization of the plaintiff company.

Affirmed.

CLARK, C. J. (dissenting). Prior to March 12, 1914, the fish business at Morehead was conducted by seven different firms consisting of eleven individuals. They operated boats in all the waters of North

Carolina and comprised all the fish dealers at Morehead (except two small dealers), and conducted 90 per cent. or more of the fish business at that point, and did a large fish business, not only in North Carolina, but in South Carolina, Georgia, and in the Northern and Eastern markets. These dealers bought in competition with each other from the fishermen operating boats at various places covering practically the entire fishing area of Eastern Carolina, packing and shipping the product to various markets of the country. The radius of 100 miles embraced in the contract whose validity is in question extended from below Southport to Nag's Head and inland to Rocky Mount beyond Wilson, Goldsboro, Clinton, and Wilmington, besides 100 miles out to sea, covering also Albemarle and Pamlico and other Sounds and rivers flowing into them. This contract of March 12, 1914, created a "combine" of all the fish dealers above mentioned, each of whom entered into an agreement that they would not "directly, indirectly, solely, or jointly, as principal, agent, manager, or otherwise, be concerned or interested in the same business heretofore carried on as aforesaid by them within the counties of Carteret and Craven in the state of North Carolina, and within 100 miles from the town of Morehead aforesaid, for ten years from the date hereof, nor permit their names to be used in connection with such business."

This simply created a "fish trust," and is as much a violation of the state and federal anti-trust law as the American Tobacco Company, the Standard Oil Trust, or any of the other great trusts which have been dissolved by the decisions of the United States Supreme Court. The object, of course, is exactly the same; i. e., to put down the price of fish when sold by the fishermen, and to put up the price when selling to the consumers, and make profits by the familiar process of destroying competition. There is no analogy between this proceeding and the ordinary one of selling one's good will in a local business as a dentist, physician, or editor and protecting the conveyance of the good will by agreeing not to compete for a limited time and in a limited territory, both of which limitations must be reasonable. This is not an agreement that is reasonable either in the extent of the territory or the duration of time nor has it the feature of such contracts, when valid, that the vendor will not enter into competition with the vendee. Here the competitors all combine and create a monopoly in the vendors.

The defendant, one of the firm of Way Bros. & Co., having no knowledge of any other business, having been engaged in the same all of his life, was forced in order to earn a livelihood to engage in business as a fish dealer in Morehead, and was handling from 50 to 70 boxes of fish per day, and was buying fish from fishermen in the waters of Eastern Carolina and at Morehead, in competition with the plaintiff, when the latter resorted to the court of equity to restrain him. The defendant was not conducting the business in the name of

Way Bros. & Co., who had entered the combine, and if he had he was not subject to an injunction in repudiating an illegal contract whose formation was indictable, under the "anti-trust" statute, but was doing business under the firm name of B. C. Way & Co. As soon as he entered the business in competition with the "combine" the price of fish to the fishermen advanced at once from one to three cents per pound, while at other points within the 100 mile radius where the defendant could not compete for lack of funds the price was kept down. The injunction was sued out by the plaintiff to prevent open competition in the market to preserve which the anti-trust statute was passed.

The contract under which the plaintiffs ask for this equitable relief is void: (1) Because against public policy; (2) because the area attempted to be embraced therein is unreasonable; (3) because such contract created a virtual monopoly of the fish business over nearly the whole sea front of this state in the hands of the plaintiff company, and prevents competition both in buying and selling fish. It takes from the fishermen reasonable returns in the sale of their "catch" by reason of the lack of competition and enhances the price to consumers for the same reason. The covenant on its face shows no consideration except compensation for the personal property put into the "combine" against which stock was issued. There was no consideration named for the agreement not to compete. Indeed, the true consideration was the monopoly of the business, which is illegal under the statute and makes the whole contract void. Even if this combine could be likened to the cases where a doctor or a dentist sells his business and good will, and in order to guarantee such conveyance of the "good will" stipulates that he will not practice within a certain territory within a certain time, this contract would be unreasonable by reason of the great space covered by a radius of 100 miles in every direction and ten years' duration. But, in truth, there can be no analogy between cases where one man sells his personal business to another with a reasonable stipulation to preserve the good will of the business and this instance, where practically all the dealers in a prime article of necessity, fish, oysters, and the like, at the chief center of that industry, enter into a combination whose evident intent and necessary effect is to create a monopoly for the purpose of reducing (as has been shown was the case here) the selling price of fish in the hands of those who catch them and to raise the selling price to the consumer.

There are affidavits in this record by more than 100 fishermen that the plaintiffs' combination, locally known as the "fish trust," has affected competition and the price. Naturally this would be so, and it is hard to realize any other motive for its formation than to make larger profits for the company as a middleman by reason of the destruction of competition. It is true that there is no express agreement to fix prices as in *State v. Craft*, 168 N. C. 208, 83 S. E. 772. Neither

was there such express agreement in the combination, and the absorption of rival companies which were held illegal and ordered to be dissolved in the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and American Tobacco Co. Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

In *Cowan v. Fairbrother*, 118 N. C. 407, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733, relied upon by the plaintiff, there was an agreement not to publish a competing paper in this state for ten years. In its very nature this could not seriously affect the public, because there is free opportunity to establish newspapers, which are largely the product of the individual ability of the editors. But the fish business is a necessity to the public, and the sale by the fishermen of their product in a competitive market is the right of the more than 1,000 men whom this record shows are engaged in this state in catching fish for market.

In *Wooten v. Harris*, 153 N. C. 46, 68 S. E. 898, it was held that, while a merchant could sell his good will in that business and could protect the conveyance thereof by agreeing not to again engage in such business in that town or "near enough thereto to interfere with the vendee's business," yet an agreement might be invalid "if it was shown that this was one of many similar contracts tending to engross or monopolize any given business or the sale of any article within the territory named."

The General Assembly of 1913 (chapter 41) intended to make more strenuous, and not less so, the laws against illegal trusts. The second proviso in subsection F, § 5, of that chapter, "Provided, further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law," applies only to a bona fide sale of the "good will" to the competitor, when the vendor does out of the business himself. It permits in such cases protection of the good will by permitting the vendor to agree not to compete within reasonable limits and within reasonable time. It has no application to a "combine" like this where the vendor goes into the combination or where the extent of territory and length of time are unreasonable. The territory here covered embraces practically nearly the entire territory in which fish can be taken in the waters of this state, including Albemarle and Pamlico Sounds, the Cape Fear, Neuse and Tar rivers, and the lower part of Roanoke and Chowan rivers; in short almost the entire water front of North Carolina, and the rivers, streams, and sounds that flow to the east.

Was it ever heard of that a stockholder in a railroad company or other enterprise affecting the public generally could contract that he

would not take part in building another railroad or sharing in the promotion of another enterprise of public interest? Aside from being in violation of the anti-trust statute, such contract would be contrary to public policy, which encourages not only competition, but the promotion of public enterprises, such as increasing the supply of food. Certainly a court of equity would not give its aid to the enforcement of such contracts. It is not objectionable that many men should join their capital to create a large corporation. That may be indeed desirable by making possible the reduction of expenses and furnishing accommodation to the public at a lesser rate. What is objectionable is binding its members not to take shares in other similar enterprises which will be for the public benefit, thus reducing competition when the public interest requires the increase of facilities in furnishing food or other public benefits. A large number of people are interested in catching fish as a livelihood, and a very much larger proportion of them are dependent, more or less, upon fish and oysters for food. A great combination like this, that strikes at those who catch fish and take oysters as a means of livelihood and at those who consume them, is in its nature even more deleterious, if possible, to the public interest than the great Tobacco Trust, which dealt with an article of luxury, and not of food.

The anti-trust law of 1913 (chapter 41) was passed to give not less, but more, effective protection to the public. The proviso therein permitting a person to sell his business and good will to another cannot be construed to destroy the entire act. Succeeding the proviso to which such great effect is attributed and in the same section is this further proviso: "Provided such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this act."

A great lawyer in England once said, as quoted by Macaulay, that he "could drive a coach and six through any act of Parliament." Certainly the entire fishing fleet of North Carolina should not be sailed through this act because an incidental provision therein permits a man to sell the "good will" of his business and to secure its conveyance by agreeing to abstain from exercising that business for a reasonable time and within reasonable limits. It ought not to be construed to permit such a "combination" as is here provided for of the entire fish and oyster industry of North Carolina by the middlemen who buy the product from the fishermen and resell it to the public.

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PART II

COMPETITIVE PRACTICES

CHAPTER I

THE PRIVILEGE OF COMPETING

ANONYMOUS.

(Court of Common Pleas, Hilary Term, 1410. Y. B. Hen. IV, f. 47, pl. 21.)

Two masters of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40d. or two shillings a quarter from each child, now they got only 12d., to their damage, &c.

Tillesley. His writ is worthless.

Skrene. It is a good action on the case, and the plaintiffs have shown well enough how they are damaged; wherefore, &c.

HANKFORD, J. There may be *damnum absque injuria*. As if I have a mill, and my neighbor builds another mill, whereby the profit of mine is diminished, I shall have no action against him; still I am damaged, *quod* THIRNING, C. J., *concessit*, and said that the instruction of children is a spiritual matter; and if one retains a master in his house to teach his children, it is a damage to the common master of the town, yet, I think, he will have no action.

Skrene. The masters of Paul's claim that there shall be no other masters in all London except themselves.

Horton demurred because the action was not maintainable.

HILL, J. There is no ground to maintain this action, since the plaintiffs have no estate, but a ministry for the time; and though another equally competent with the plaintiffs comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law.

Skrene. If a market is erected to the nuisance of my market, I shall have an assize of nuisance; and in a common case, if those coming to my market be disturbed or beaten, whereby I lose my toll, I shall have a good action on my case; so here.

HANKFORD, J. Not the same case, because in the case put you have a freehold and inheritance in the market; but here the plaintiffs have no estate in the schoolmastership, &c., but for an uncertain time, and

it would be against reason for a master to be hindered from keeping school where he pleases, unless where a university was incorporated or a school founded in ancient times.

And the opinion of the court was that the writ would not lie. Wherefore it was awarded that they should take nothing, &c.

TUTTLE v. BUCK.

(Supreme Court of Minnesota, 1909. 107 Minn. 145, 119 N. W. 946, 22 L. R. A. [N. S.] 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807.)

This appeal was from an order overruling a general demurrer to a complaint¹ in which the plaintiff alleged: That for more than 10 years last past he has been and still is a barber in Howard Lake, Minn., owning and operating a shop; that until the injury hereinafter complained of his said business was prosperous; that the defendant, during the period of about 12 months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business and compel plaintiff to abandon the same; that to that end he has persistently sought, by false and malicious reports concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given; that defendant is possessed of large means, and is engaged in the business of a banker in Howard Lake, at Dassel, Minn., and at divers other places, and is now interested in the occupation of a barber, yet in the pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole purpose of injuring the trade of of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up a barber shop in said village for conducting the trade of barbering; that failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said defendant has been or may be able by the means aforesaid to direct from plaintiff's shop; that at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted by the defendant, without paying any rent therefor, and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages; that all of

¹ The complaint has been slightly abridged.

said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own; that by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of \$10,000.

ELLIOTT, J. (after stating the facts as above). It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive. In *Allen v. Flood*, [1898] A. C. 151, Lord Watson said that, except with regard to crimes, the law does not take into account motives as constituting an element of civil wrong. In *Mayor v. Pickles*, [1895] A. C. 587, Lord Halsbury stated that if the act was lawful, "however ill the motive might be, he had a right to do it." In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, the court said that, "where one exercises a legal right only, the motive which actuates him is immaterial." In *Jenkins v. Fowler*, 24 Pa. 318, Mr. Justice Black said that "mischievous motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful." This language was quoted in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, and in substance in *Ertz v. Produce Exchange*, 79 Minn. 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433. See, also, *Cooley*, Torts (3d Ed.) p. 1505; *Auburn & Co. v. Douglass*, 9 N. Y. 444. Such generalizations are of little value in determining concrete cases. They may state the truth, but not the whole truth. Each word and phrase used therein may require definition and limitation. Thus, before we can apply Judge Black's language to a particular case, we must determine what act is "in its own essence lawful." What did Lord Halsbury mean by the words "lawful act"? What is meant by "exercising a legal right"? It is not at all correct to say that the motive with which an act is done is always immaterial, providing the act itself is not unlawful. Numerous illustrations of the contrary will be found in the civil as well as the criminal law.

We do not intend to enter upon an elaborate discussion of the subject, or become entangled in the subtleties connected with the words "malice" and "malicious." We are not able to accept without limitations the doctrine above referred to, but at this time content ourselves with a brief reference to some general principles. It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress up-

on the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories.

For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, Id., 92 Minn. 230, 99 N. W. 882, and *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365.

Many of the restrictions which should be recognized and enforced result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a willful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a positive duty to avoid harm, much more, then, exists the negative duty of not doing willful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from willful injury, to respect the property of others, and to use due diligence

to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, *Torts* (8th Ed.) p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, willfully and intentionally, without just cause and excuse."

In *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, Mr. Justice Hammond said: "It is said, also, that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in [1898] A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate." Similar language was used by Mr. Justice Wells in *Walker v. Cronin*, 107 Mass. 555; by Lord Coleridge in *Mogul Steamship Co. v. McGregor*, 21 Q. B. D. 544-553; by Lord Justice Bowen in the same case, 23 Q. B. D. 593; by Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154; by Chief Justice McSherry in *Klingel's Pharmacy v. Sharp*, 104 Md. 233, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399; and by Judge Sanborn in his dissenting opinion in *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. Numerous cases will be found referred to in the note to this case in 62 L. R. A. 673, and in an article in 18 *Harvard Law Review*, 411.

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is sim-

ply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the Justices, however, are of the opinion that, on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

JAGGARD, J., dissents.

PASSAIC PRINT WORKS v. ELY & WALKER
DRY-GOODS CO.

(Circuit Court of Appeals of the United States, 1900. 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This case was determined below on a demurrer to the plaintiff's petition, which was sustained, and a final judgment was entered against the Passaic Print Works, the plaintiff below, it having declined to plead further. The plaintiff's petition contained the following allegations:

That the plaintiff was * * * engaged in the manufacture of prints or calicoes, * * * and by careful management of its business had earned a reputation of manufacturing a high class of such goods. That it sold its goods * * * to jobbers or wholesale dealers throughout the United States, who in turn sold the same to the retail trade. That the city of St. Louis, Mo., was one of the markets in which its prints or calicoes were sold at wholesale, and that it had a large and prosperous trade in that city; that among the goods by it

manufactured and sold were four brands of calicoes known as "Trouville Mourning Prints," "Central Park Shirtings," "Elmora Fancy Prints," and "Ramona Fancy Prints," all of which were of a kind largely purchased by jobbers in the St. Louis market, being well suited to the retail trade tributary thereto. That its selling agents had fixed the price for said brands of calicoes for the season of 1899 as follows: For the Trouville mourning prints, $3\frac{1}{2}$ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Central Park shirtings, $3\frac{1}{2}$ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Elmora fancy prints, $4\frac{1}{2}$ cents per yard, less a discount of 10 per cent. and 2 per cent.; and for the Ramona fancy prints, 4 cents per yard, less a discount of 5 per cent. That at the date aforesaid the blank cloth from which such calicoes were made was selling at $2\frac{1}{2}$ cents per yard, and that the price above specified for the finished product was its price at Passaic, N. J., without the addition of any freight.

It was further alleged that prior to February 25, 1899, the plaintiff had received orders for a large amount of the several kinds of prints aforesaid at the prices above specified from several large wholesale dealers doing business in the city of St. Louis, and "that on or about the 25th day of February, 1899, the said defendants, * * * combining and conspiring among themselves and with others to the plaintiff unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular in the name of the said defendant corporation to be issued and sent out to the retail trade tributary to St. Louis, which said circular was in words and figures following; that is to say: 'Ely & Walker Dry-Goods Co. We beg to call your attention to the following items at prices that cannot be replaced, and request you to order promptly if interested, to secure first selection of styles. Prices for all items subject to change without notice, and orders accepted only for stock on hand.'" Then followed a long list of various brands of cloth, with a specification of the prices at which the various brands would be sold, and among them the following: "Trouville mourning prints, as long as they last, $3\frac{1}{4}$; Central Park and Boat Club shirting prints, as long as they last, $2\frac{7}{8}$; Elmora and Ramona fancy prints, as long as they last, $3\frac{1}{2}$."

It was next averred that the plaintiff had not sold to * * * either of the individual defendants any of the aforesaid prints or calicoes of its manufacture for a period of about one year prior to February 25, 1899; that it had never sold to said defendants any Elmoras or Ramonas; that, if said defendant had any of said last-mentioned prints, it had purchased them at second-hand; that as it was informed and believed the defendants had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in its circular the words "as long as they last"; and that the price named in said cir-

cular for the aforesaid four brands of prints of its manufacture was less than the price charged by the plaintiff for said prints, it having universally charged for said prints for delivery in the spring of 1899 the several prices therefor heretofore specified.

It was next averred that the effect of the aforesaid circular was to advertise to the retail trade tributary to the city of S. Louis that the four brands of calicoes aforesaid of the plaintiff's manufacture could be purchased at a less price from the defendant corporation than they could be from other jobbers in the city of St. Louis to whom the plaintiff had sold large quantities thereof, and to cause said other jobbers to either cancel their orders, or to compel the plaintiff to make a rebate on the price of its goods in order that other jobbers might meet the prices so specified in the defendant's circular, and to break up, injure, and destroy the sale and trade in such prints in the St. Louis market and in the country tributary thereto, except at greatly reduced prices.

It was also alleged, but on information and belief, that the quotations aforesaid in the defendant's circular were made for the purpose of injuring and destroying the plaintiff's trade in the manner last stated, and that in consequence of the issuance of said circular the plaintiff had lost profits on sales which it otherwise might have made to the amount of \$10,000, and had been further damaged by having to change the name of its goods and by having their identity lost to the amount of \$20,000, and had also been further damaged by the malicious acts complained of to the amount of \$20,000; making its total loss \$50,000, for which sum it prayed judgment.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The complaint filed in the lower court, the substance of which has been stated, shows by necessary intendment that when the circular of the defendant company was issued it had in stock a limited quantity of the four brands of calico of the plaintiff's manufacture which are therein described. The circular stated, in substance, that the defendant had such calicoes in stock, and the complaint did not deny that fact, but admitted it by averring that "the defendant corporation had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in the circular after the name of the goods the words 'as long as they last.'" Moreover, the owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale. The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is *damnum absque injuria*.

We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act, and rendered the same unlawful, when, but for the motive of the actor, it would have been clearly lawful. It is common learning that a bad motive—such as an intent to hinder, delay, and defraud creditors, by virtue of St. 13 Eliz. c. 5, and possibly by the rules of the common law—will render a conveyance or transfer of property void which, but for the bad motive, would have been valid. So, also, one who sets the machinery of the law in motion without probable cause, and for the sole purpose of injuring the reputation of another, or subjecting him to loss and expense, is guilty of an unlawful act which would have been lawful but for the improper motive. And one who, by virtue of his situation, has a qualified privilege to make defamatory statements concerning another, may be deprived of the benefit of that privilege by proof that it was not exercised in good faith, but in pursuance of a malicious intent to injure the person concerning whom the defamatory statement or statements were made. Poll. Torts (Webb's Ed.) pp. 331–335, and cases there cited. There is also some authority for saying that one who maliciously (that is, with intent to obtain some personal benefit at another's loss or expense) induces another to break his contract with a third party, thereby commits an actionable wrong if special damage is disclosed, although the act done would have been lawful if the wrongful motive had been absent. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Walker v. Cronin*, 107 Mass. 555. And see Poll. Torts (Webb's Ed.) pp. 668–673.

Aside from cases of the latter kind, it is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right. Or, as has sometimes been said, "when an act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive." The question as to how far and under what circumstances a bad purpose will render an act actionable which, considered by itself, and without reference to the purpose which prompted it, is lawful, has been so much discussed since the decision in *Allen v. Flood*, [1898] 1 App. Cas. 1, that it would be profitless to indulge in further comment. It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice or ill will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the

cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated—that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful.

In the brief filed in behalf of the plaintiff in error it is suggested finally that the complaint may be sustained on the ground that it states a good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff, but we think it quite obvious that the complaint was not framed with a view of stating a cause of action of that nature, and that it is insufficient for that purpose. It does not give the name of any person or corporation with whom the plaintiff had a contract for the sale of its prints which was subsequently broken in consequence of the wrongful acts of the defendant. Neither does it show that it had accepted any orders for goods which the jobber was not privileged to cancel at his pleasure. Nor does it allege any special damage incident to the breach of any particular contract. In view of all the allegations which the complaint contains it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in issuing it was to occasion loss or inconvenience to the plaintiff.

We are of opinion that the complaint did not state a cause of action, as the trial court held, and the judgment below is therefore affirmed.

SANBORN, Circuit Judge (dissenting).² I cannot concur in the opinion of the majority in this case because the petition alleges that the defendants, by their advertisement of the goods manufactured by plaintiff, without any legitimate trade purpose, prevented jobbers from purchasing goods of the plaintiff, and caused those who had agreed to purchase from it to cancel their orders unless the plaintiff would make them a rebate, so that the plaintiff sustained damage in the sum of \$19,000. In my opinion, the gravamen of this cause of action is not

² Part of this opinion is omitted.

the malicious intent or purpose of the defendants, but it is their wrongful act of interfering with the plaintiff's business, of preventing sales that it would have made, and of causing the cancellation of orders to, or contracts of purchase from, the plaintiff already made. This act, without any allegation or averment of intent or purpose, was itself wrongful, unless it was done for a justifiable purpose. The act of interfering with and injuring the trade or business of the plaintiff without justifiable cause entitled the plaintiff to damages. It is conceded that, if the defendants had advertised these prints for any legitimate trade purpose, for the purpose of selling them for gain for themselves, for the purpose of converting them into money because they preferred their advertised price to the goods, or for the purpose of competing in trade with the plaintiff, they would have had a justifiable cause for inflicting upon it the damages of which it complains, and these damages would then have been *damnum absque injuria*. But, if they had advertised them for any of these purposes, this case would have constituted an exception to the general rule of law. The general rule is that whenever one injures a man's business, profession, or occupation he is liable for the damages he inflicts. The exception is that, where the injury is caused by competition in trade or the lawful exercise of a right which the inflictor has, then the injury is justifiable, and no damages can be recovered. But, where such an injury is inflicted, the presumption always is that the rule, and not the exception, applies, and, if the inflictor would justify, he must show that he falls within the exception.

The question in this case, therefore, is not whether or not the motive or intent of the defendants will make acts unlawful which were otherwise lawful, but whether or not the intent and purpose of the defendants will justify an otherwise unlawful act, and excuse them from the payment of damages for which, under the general rule of law, they are liable to the plaintiff. It is whether or not the petition shows that they advertised the goods for legitimate trade purposes, so that their acts fell within the exception, which justifies the infliction of damages, and not under the general rule, which requires them to compensate the plaintiff for the injury they have caused. The opinion of the majority assumes that the defendants advertised the prints for a legitimate trade purpose, so that their acts fell within the exception to the general rule. It overlooks the legal presumption that injury to one's business entitles him to compensatory damages, and the plain averment of the petition that the acts of the defendants were not done for any justifiable cause, but were committed for the sole purpose of inflicting upon the plaintiff the injury they caused. * * *

Now, no one will dispute the rules of law that the plaintiff in this action had the right to conduct its business of manufacturing and selling prints without the injurious interference of strangers, and that the defendants were subject to the universal rule that they must so use their own property and rights as to inflict no unnecessary injury

upon their neighbors. The averments of this petition are that they were not using any of their property or exercising any of their rights for any legitimate trade purpose, but that they were using them for the express purpose of inflicting injury upon the plaintiff, and that they succeeded in imposing the infliction. These allegations seem to me to bring this case under the general rule of law, and to clearly negative the claim that it falls within the exception. They seem to state a good cause of action. The principle upon which this conclusion rests is nowhere better stated than by Chief Justice Holt in the old case of *Keeble v. Hickeringill*, 11 East, 574, note, where the plaintiff recovered damages from the defendant for firing guns on his own land which frightened wild ducks away from the decoy pond of the plaintiff, where the latter was taking them to sell for gain. He said:

"Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. But if a man doth him damage by using the same employment—as, if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff—no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Hen. IV, p. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But, suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars. 29 Edw. III, p. 18. A man hath a market, to which he hath toll for horses sold. A man is bringing his horse to market to sell. A stranger hinders and obstructs him from going thither to the market. An action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 Hen. VII, pp. 7, 8; 21 Hen. VI, p. 31; 14 Edw. IV, p. 7." 11 East, 576, note. * * *

The proposition is sustained by respectable authority; it is just, and I believe it is sound—that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as competition in trade. *Walker v. Cronin*, 107 Mass. 555, 565; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524; *Hartnett v. Association*, 169 Mass. 229, 235, 47 N. E. 1002, 38 L. R. A. 194; *Delz v. Winfree*, 80 Tex. 400, 405, 16 S. W. 111; *Doremus v. Hennessy*, 62 Ill. App. 391, 403; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485; *Temperton v. Russell*, 62 Law J. (Q. B. Div. 1893) 412, 419. * * *

There is another reason why the judgment below should be reversed. It is that the petition sufficiently states a cause of action for maliciously interfering with contracts between jobbers in St. Louis

and the plaintiff, and inducing the former to break their contracts to the injury of the latter. The petition alleges that the defendants were jobbers in the city of St. Louis, that they issued the circular, that its effect was "to thereby cause the said other jobbers in St. Louis to either cancel their orders, or portions thereof, so as aforesaid given to the said plaintiff for such goods, or, as an alternative, to compel the plaintiff to relabel the goods, and to give a rebate on the price, in order that said jobbers might meet the prices so offered by the circular of said defendant corporation, and to thereby break up, injure, and destroy the sales and trade of the said plaintiff in the market of St. Louis and the country tributary thereto." Here is a plain allegation that contracts had been made for the sale of these goods to the other jobbers in St. Louis, and that the acts of the defendant corporation induced them to break their contracts, or to compel the plaintiff to lose a portion of the price agreed upon therein as a condition of their performance. Whenever one maliciously interferes in a contract between two parties, and induces one of them to break the contract to the injury of the other, the injured party may maintain an action against the wrongdoer for his damages. *Angle v. Railway Co.*, 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333, 337; *Green v. Button*, 2 Crompt., M. & R. 707; *Walker v. Cronin*, 107 Mass. 555; *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; *Jones v. Stanly*, 76 N. C. 355, 356; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Temperton v. Russell*, 62 Law J. (Q. B. Div. 1893) 412, 419.

For the reasons which have now been briefly stated, the judgment below should, in my opinion, be reversed, and the defendants should be required to answer the petition.

DUNSHEE v. STANDARD OIL CO. et al.

(Supreme Court of Iowa, 1911. 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. [N. S.] 263.)

Action at law to recover damages for unlawful interference with trade. Judgment for plaintiff, and defendants appeal. The plaintiff also appeals, but in the discussion of the case defendants only will be spoken of as appellants.

WEAVER, J. During all the period covered by this controversy, the Standard Oil Company has been a wholesale dealer in oil at the city of Des Moines. In the year 1893 the Crystal Oil Company (plaintiff's assignor), a local corporation, entered the retail trade in oil, selling its goods from tank wagons hauled about the streets, and delivered to its customers at their homes. Its business grew from year to year until, in 1898, it employed from four to eight wagons, covering the territory of the city very generally. During the period mentioned, the

Crystal Company purchased its supplies from the defendant, but in 1898 it for some reason began to make purchases from other wholesale dealers. Trouble at once ensued. The defendant, which, up to that time, had abstained from the retail trade, proceeded to equip itself with tank wagons, teams, and drivers substantially equal in number to those of the Crystal Company, and began active solicitation for the patronage of the "ultimate consumer." At the end of some months of strife, the Crystal Company abandoned the contest and quit the business at a loss, claiming to have been driven out by the tactics of its rival. The plaintiff, as assignee of said company, brings this action for damages, alleging a conspiracy between the Standard Oil Company and its managers, agents, and employes to ruin the business of said Crystal Company, and setting forth alleged wrongful acts done in pursuance of such conspiracy by which said company's business was destroyed.³

1. Upon the issues of fact, we shall attempt no general review of the testimony. For present purposes it is enough to say that the case as made by the plaintiff tends strongly to show that defendant installed its scheme of retail distribution of oil in the city of Des Moines not for the purpose of establishing a retail trade, but as a mere temporary expedient to drive out the Crystal Company, and that, this being accomplished and having the field to itself, it withdrew its wagons and drivers, and gave its whole attention to its wholesale business. In the prosecution of its business, the Crystal Company was accustomed to supply its customers with cards to be displayed from a window or other conspicuous place, indicating a desire to purchase oil and inviting the distributor to stop and furnish the needed supply. The evidence further tends to show that when the Standard entered the field its drivers were directed to give special attention to the Crystal Company's "green cards," and that, at the outset at least, there was little or no attempt to build up a retail trade with the public generally, but to take away or destroy the trade of the Crystal Company. Some of the witnesses say the Standard's drivers would make it a point to get in advance of the Crystal's wagons, and wherever a green card was displayed would stop and make the sale if possible, sometimes permitting the buyer to suppose that he or she was dealing with a Crystal agent, and in other cases appropriating or carrying away the Crystal's cards.

The Standard's hand in these efforts was not disclosed to the public. The drivers were instructed to do business ostensibly as independent dealers driving their own wagons, none of which were marked with the Standard's name, though in fact the outfits were furnished and all expenses paid by it, and the entire business was carried on under the secret management of its agent, who held frequent meetings with the drivers, urging them to "go after the green cards,"

³ A ruling on a question of pleading is omitted.

to "hustle the green cards," to "go after the Crystal Oil Company," and at the same time cautioned them to "keep quiet" about the real ownership and management. It is further testified that when the Crystal Company had been eliminated the manager in charge had a final meeting of the drivers at his residence, where he said, "The fight is over and we have bought them out." Plaintiff also shows that defendants' movement in the matter followed closely upon the Crystal Company's exercise of its right to purchase part of its oil from another dealer, and had refused to yield to the Standard's insistence that it wanted "all or none" of the Crystal's trade. In short, the record as a whole is sufficient to justify the inference that the real end sought to be accomplished was to bar or exclude from the retail trade one who would not give the Standard Company, as a wholesale dealer, its exclusive patronage. The defendants take issue upon the charge as thus preferred, but the jury could properly find the facts to be as above outlined.

As we understand appellants' contention, it is that their conduct did not transgress the bounds of legitimate competition, and that so long as they kept within this limitation the question of the alleged malice or motive inspiring their acts is wholly immaterial. Cases involving the question thus suggested have frequently arisen, both in this country and in England, and there is much in harmony in the expressions of judicial opinion thereon. Many authorities may be found holding without apparent qualification or exception, that the law takes no account whatever of motives as constituting an element of civil wrong. In other words, if a man do a thing which is otherwise lawful, the fact that he does it maliciously and for the express purpose of injuring his neighbor affords the latter no remedy at law. Such is the net effect of *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, *Jenkins v. Fowler*, 24 Pa. 308, and others of that class.

If this be the correct view of the law, a man may excavate the earth near the boundary of his own land for the mere purpose of seeing the foundation of the house of his neighbor slide into the pit thus prepared for it; he may dig through his own soil to the subterranean sources of his neighbor's spring or well and divert the water into a ditch, where it will serve no purpose of use or profit to himself or any one else; if a banker or merchant, he may punish the blacksmith who refuses to patronize him by temporarily establishing a shop on the next lot and hiring men to shoe horses without money and without price, until he has driven the offending smith to come to his terms or to go out of business; and if a farmer, dependent upon a subterranean supply of water for the irrigation of his soil or watering of his livestock, he may contrive to ruin his competing neighbor by wasting the surplus not reasonably required for his own use.

The laws of competition in business are harsh enough at best; but

if the rule here suggested were to be carried to its logical and seemingly unavoidable extreme there is no practical limit to the wrongs which may be justified upon the theory that "it is business." Fortunately, we think, there has for many years been a distinct and growing tendency of the courts to look beneath the letter of the law and give some effect to its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong. It is doubtless true that under many circumstances an act is legally right and defensible without regard to the motive which induces or characterizes it; but there is abundance of authority for saying that this is by no means the universal rule, and that an act which is legally right when done without malice may become legally wrong when done maliciously, wantonly, or without reasonable cause.⁴

Dealing with the perplexities arising in the effort to sustain, on the one hand, the widest practicable liberty of men to engage in any and every line of business, and, on the other, to protect the business of each from wrongful encroachment or interference by others, the New Hampshire court, after reference to many of the decided cases, has lately said: "That more recent authorities reason that, as the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty *prima facie* a man may demand an open market, and, since this is so, one who interferes with this open market must justify his acts, or respond in damages. Thus far these authorities are uniform, but when they proceed to the determination of what amounts to a justification they differ widely. The cause is not far to seek. The rule they apply is that of reasonable conduct; yet they decide each case as though it involved only a question of law. In reality, the issue is largely one of fact, and the result is what would be expected. Judges are men, and their decisions upon complex facts must vary as those of juries might on the same facts. Calling one determination an opinion and the other a verdict does not alter human nature, nor make that uniform and certain which from its nature must remain variable and uncertain. While these cases go too far in what they decide as questions of law, yet the test they constantly declare they are applying is the true one. The standard is reasonable conduct under all the circumstances of the case." *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966. See, also, *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; *Horan v. Burns*, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433.

As suggested in the foregoing quotation, no definition or standard of reasonable cause can be stated which will insure absolute uniformity or even consistency in the decision of such cases, because the issue

⁴ Here follow an extended citation and review of cases.

presented is in its essence one of fact, and the same facts and circumstances will not always appeal with like effect to the minds of all jurors or of all judges. It is for this reason that, save in those exceptional cases where the case of the plaintiff or the defendant is so clear and undisputable that all fair-minded persons are forced to the same conclusion, controversies of this nature, in a trial at law, are for the jury, and not for the court.

Coming to the case in hand, we may concede to the appellants the undoubted right to establish a retail oil business in Des Moines, to employ agents and drivers, and send them out over the same routes and make sales to the same people with whom the Crystal Oil Company was dealing; but in so doing it was bound to conduct such business with reasonable regard and consideration for the equal right of the Crystal Company to continue supplying oil to such of its customers as desired to remain with it. If, however, there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people. And if, under such pretense of competition, defendants maliciously interfered with the business of the Crystal Oil Company in the manner charged, and injury to the latter was thereby inflicted, a right of action exists for the recovery of damages.

It may be conceded that authorities are not wanting to sustain the position that, even though the Standard Oil Company had no intention of becoming a retail dealer in oil in Des Moines, but entered the business of selling oil in this manner temporarily, for the sole purpose of driving the Crystal Company out, it is a matter into which the courts will not inquire; but we think such precedents are out of harmony with fundamental principles of justice, which, as we have said, underlie the law, as well as out of harmony with the later and better-considered cases. True, the Standard Company, as a wholesale dealer, would violate no law in offering its product for sale at retail at half price in the territory supplied by the Crystal Company, but such fact, if proven, would have a distinct bearing upon the reasonableness of its methods employed in diverting trade from said company, as well as upon the charge that in interfering between the Crystal Company and its customers the Standard Company was actuated by malice or spirit of wanton assault upon the business of another, who had given it offense.

Of the cases which directly or indirectly sustain this view there are many, but we shall not extend this discussion to make extended reference to them. Sufficiently analogous in fact to illustrate the prin-

ciple is *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446.⁵

No man entering or carrying on business has any right to demand protection against fair competition, and if he cannot meet it and succeed he must expect to fail, and for losses and injuries resulting the law affords him no remedy. But if competition be "war," in which "everything is fair," or if it be so regarded by those who participate therein, certainly the law will not give that doctrine its sanction. It follows of necessity that the trial court did not err in refusing to direct a verdict in defendants' favor.

2. In ruling upon the defendants' motion for a directed verdict, the trial court seems to have held or suggested that proof that defendants, in pursuance of their alleged conspiracy, had interfered with contracts made between the Crystal Company and its patrons would give rise to a cause of action, and upon the final submission of the cause it instructed the jury, as a matter of law, that the display of the green cards were orders upon the Crystal Company for the delivery of oil, and that a malicious interference by the defendants with the filling of such orders by the Crystal Company would be a wrong for which an action would lie, if such interference was in pursuance of a conspiracy between the defendants to injure the business of said company. Of this instruction both parties complain, and we are inclined to the view that it cannot be sustained as broadly as stated.

Referring, first to plaintiff's exception, we think the proposition last stated places a too narrow construction upon the rule of law here applicable, in that it seems to require, not only the proof of a malicious wrong and injury therefrom, but further proof that such wrong was done in pursuance of a conspiracy previously formed. The gravamen of the charge made is not the alleged conspiracy, but the wrong done to the plaintiff's assignor, and if the wrong is sufficiently established by the evidence a recovery may be had by the party injured, although there be a failure of proof of the conspiracy.

The defendants' exception to the instruction is that the display of the cards by the Crystal Company's customers cannot be said, as a matter of law, to constitute orders upon that company. The point is well made. True, if there were some prior arrangement or agreement with a customer by which the display of a card would evidence a definite order, such act might be as effective as the sending of a written request to the company for a stated quantity of oil at a definite price; but the record does not disclose such a state of facts, and we think that, so far as the evidence goes, the display should be treated rather as a notice or invitation to the Crystal Company's drivers, observance of which on their part would lead to a sale.

But we are not of the opinion that an actual contract must exist before wanton interference by a third party would amount to a legal

⁵ The review of this case is omitted.

wrong. For illustration, if, instead of displaying cards, it was the habit of the Crystal Company's customers to communicate their wants by messenger or by telephone, and that defendant in the zeal of competition should maliciously intercept the messenger and induce him to reveal the nature of his errand, or should maliciously tap the telephone wire and with the advantage thus acquired should rush their wagons to the front and deprive the company of the sales which it would otherwise have made, we think no advocate of the widest allowable license of unrestricted competition would contend that this would not constitute a legal wrong, even though the conduct complained of did not in fact amount to an interference with an existing contract. For the same reason we think the defendants could not, upon the plea of competition, justify any malicious interference with existing contracts or orders of the Crystal Company, or interfere with or remove the cards posted as an invitation or notice to said company for the delivery of oil; but we think the court cannot assume to say, as a matter of law, that the display of such cards constituted in itself either a contract or order. It may be open to some question whether the error of the instruction was of a prejudicial character, but, taking the record as a whole, we think it the safer conclusion to solve that doubt in the appellants' favor.

3. The trial court correctly instructed the jury that, if plaintiff had established his right to recover because of the wrongful and malicious acts of the defendants as charged, he was entitled to a verdict for the actual damages so sustained by the Crystal Company, to which sum the jury were at liberty to add exemplary damages. It also, in another connection and in a general way, told the jury that, if found entitled to recover, plaintiff should also be allowed interest on the damages so sustained. The jury returned a general verdict for plaintiff for a sum stated in round numbers, but not indicating what part, if any, of said amount was allowed as exemplary damages. Neither does it indicate how much of the verdict is for interest, nor on what part of it interest was computed.⁶ Interest as such upon exemplary damages is not recoverable. 16 Am. & Eng. Ency. Law (2d Ed.) 1031. The error is one which is not amenable to correction in this court, except by an order for a new trial. * * *

For the reasons stated, the judgment of the district court is reversed, and the cause remanded for a new trial.

⁶ A part of the discussion of the question of damages is omitted.

AMERICAN BANK & TRUST CO. v. FEDERAL RESERVE
BANK OF ATLANTA, GA.

(Supreme Court of the United States, 1921. 256 U. S. 350, 41 Sup. Ct. 499, 65 L. Ed. 983.)

Suit by the American Bank & Trust Company and others against the Federal Reserve Bank of Atlanta, Ga., and others, begun in the state court and removed to the United States District Court. A decree dismissing the bill was affirmed by the Circuit Court of Appeals (269 Fed. 4), and plaintiffs appeal.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by country banks incorporated by the State of Georgia against the Federal Reserve Bank of Atlanta, incorporated under the laws of the United States, and its officers. It was brought in a State Court but removed to the District Court of the United States on the petition of the defendants. A motion to remand was made by the plaintiffs but was overruled. The allegations of the bill may be summed up in comparatively few words. The plaintiffs are not members of the Federal Reserve System and many of them have too small a capital to permit their joining it—a capital that could not be increased to the required amount in the thinly populated sections of the country where they operate. An important part of the income of these small institutions is a charge for the services rendered by them in paying checks drawn upon them at a distance and forwarded, generally by other banks, through the mail. The charge covers the expense incurred by the paying bank and a small profit. The banks in the Federal Reserve System are forbidden to make such charges to other banks in the System. Federal Reserve Act of December 23, 1913, c. 6, § 13; 38 Stat. 263; amended March 3, 1915, c. 93; 38 Stat. 958; September 7, 1916, c. 461; 39 Stat. 752; and June 21, 1917, c. 32, §§ 4, 5; 40 Stat. 234, 235 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796). It is alleged that in pursuance of a policy accepted by the Federal Reserve Board the defendant bank has determined to use its power to compel the plaintiffs and others in like situation to become members of the defendant, or at least to open a non-member clearing account with defendant, and thereby under the defendant's requirements, to make it necessary for the plaintiffs to maintain a much larger reserve than in their present condition they need. This diminution of their lending power coupled with the loss of the profit caused by the above mentioned clearing of bank checks and drafts at par will drive some of the plaintiffs out of business and diminish the income of all. To accomplish the defendants' wish they intend to accumulate checks upon the country banks until they reach a large amount and then to cause them to be presented for payment over the counter or by other devices detailed to require payment in cash in such wise as to compel the plaintiffs to maintain so much cash in their vaults as to drive them

out of business or force them, if able, to submit to the defendant's scheme. It is alleged that the proposed conduct will deprive the plaintiffs of their property without due process of law contrary to the Fifth Amendment of the Constitution and that it is *ultra vires*. The bill seeks an injunction against the defendants collecting checks except in the usual way. The District Court dismissed the bill for want of equity and its decree was affirmed by the Circuit Court of Appeals. The plaintiffs appealed, setting up want of jurisdiction in the District Court⁷ and error in the final decree.

On the merits we are of opinion that the Courts below went too far. The question at this stage is not what the plaintiffs may be able to prove, or what may be the reasonable interpretation of the defendants' acts, but whether the plaintiffs have shown a ground for relief if they can prove what they allege. We lay on one side as not necessary to our decision the question of the defendants' powers, and assuming that they act within them consider only whether the use that according to the bill they intend to make of them will infringe the plaintiffs' rights. The defendants say that the holder of a check has a right to present it to the bank upon which it was drawn for payment over the counter, and that however many checks he may hold he has the same right as to all of them and may present them all at once, whatever his motive or intent. They ask whether a mortgagee would be prevented from foreclosing because he acted from disinterested malevolence and not from a desire to get his money. But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime.

A bank that receives deposits to be drawn upon by check of course authorizes its depositors to draw checks against their accounts and holders of such checks to present them for payment. When we think of the ordinary case the right of the holder is so unimpeded that it seems to us absolute. But looked at from either side it cannot be so. The interests of business also are recognized as rights protected against injury to a greater or less extent, and in case of conflict between the claims of business on the one side and of third persons on the other lines have to be drawn that limit both. A man has a right to give advice but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action. Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be

⁷ The discussion of this point is omitted.

demanding on any one day. If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result even if less complete in its effect is to be expected from the course that the defendants are alleged to intend, and to determine whether they are authorized to follow that course it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the petitioner's business as now conducted is justified by the ulterior purpose in view.

If this were a case of competition in private business it would be hard to admit the justification of self interest considering the now current opinion as to public policy expressed in statutes and decisions. But this is not a private business. The policy of the Federal Reserve Banks is governed by the policy of the United States with regard to them and to these relatively feeble competitors. We do not need aid from the debates upon the statute under which the Reserve Banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the States.

Decree reversed.

CHAPTER II

INTIMIDATING AND MOLESTING

GARRET v. TAYLOR.

(Court of King's Bench, 1621. Cro. Jac. 567.)

Action on the case. Whereas he was a free mason, and used to sell stones, and to make stone buildings, and was possessed of a lease for divers years to come of a stone pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c.

After judgment by nihil dicit for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act or insult: and causeless suits on fear are no cause of action.

Sed non allocatur; for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action; and although it be not shown how he was possessed for years, by what title, &c., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.

TARLETON v. McGAWLEY.

(Court of King's Bench, Nisi Prius, 1793. Peake's N. P. 205.)

This was a special action on the case. The declaration stated: That the plaintiffs were possessed and owners of a certain ship called the Tarleton, which at the time of committing the grievance was lying at Calabar on the coast of Africa, under the command of ——— Fairweather. That the ship had been fitted out at Liverpool with goods proper for trading with the natives of that coast for slaves and other goods. That also before the committing the grievance Fairweather had sent a smaller vessel called the Bannister with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to another part of the said coast called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he

well knowing the premises, but contriving and maliciously intending to hinder and deter the natives from trading with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the *Othello*, of which he was master and commander, a certain cannon loaded with gunpowder and shot at the said canoe, and killed one of the natives on board the same. Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c., and plaintiffs lost their trade.

LORD KENYON: This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the court may hereafter be taken whether it will support an action. I am of opinion it will. This case has been likened to cases which it does not at all resemble. It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffick. That I entirely accede to, but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, and a *jus positivum* is not binding on foreigners. The king of the country and not the defendant should have executed that law. Had this been an accidental thing, no action could have been maintained, but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands.

The plaintiffs had a verdict.

EVENSON v. SPAULDING.

(Circuit Court of Appeals of the United States, 1907. 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. [N. S.] 904.)

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

For opinion below, see 149 Fed. 913.

This is an appeal from an order granting an injunction *pendente lite*. The bill alleged in substance that the appellees are engaged in the manufacture and sale of buggies and wagons; that their place of manufacture is in the state of Iowa; that for many years they have been engaged in selling their buggies and wagons in other states, including the state of Washington; that they have had, during the summer season, agents and salesmen in the state of Washington who travel through the country selling buggies and wagons, especially to farmers and oth-

ers residing in the rural districts; that their wagons and buggies are strong and especially adapted to the needs of farmers, and have acquired a reputation in the state of Washington as buggies and wagons of high grade and excellent quality, purchasable at reasonable prices, and that such reputation and standing of the appellees in said community in said business is of very great value to them; that a few months prior to the filing of the bill, many of the dealers in hardware and farming implements in eastern Washington conspired and confederated together for the purpose of monopolizing such business in such section, and especially for the purpose of preventing manufacturers and dealers in hardware and farming implements residing without the limits of the state of Washington from selling any of such goods, wares, and merchandise in such state at retail, and to prevent the appellees from selling their buggies and wagons at retail to farmers and others in the rural districts; that said local dealers formed an association under the name of the "Inland Empire Implement and Hardware Dealers' Association;" that some of the members are dealers in hardware, and are not engaged in the business of selling buggies and wagons or other farming implements, while others are local dealers in farming implements; that the association includes members residing in the counties of Spokane, Lincoln, Douglas, Adams, Perry and Okanogan; that the members of such association raised a fund of \$10,000, and placed the same in the hands of the appellant Evenson, to be used for the purpose of preventing the appellees from selling any buggies or wagons in eastern Washington at retail; that for several weeks last past the appellees have had about 20 employés engaged in selling buggies and wagons in eastern Washington; that their method of doing business was to drive through the rural districts hauling from two to four wagons and stopping at farmhouses and other places where customers would probably be, offering the same for sale; that before offering said buggies and wagons for sale the appellees paid the taxes thereon as provided by statute, and, in other respects, complied with the statutes of the state of Washington; that said association, through the appellants Evenson, Lucas, and Hay, unlawfully interfered with the business of the appellees, and have threatened, intimidated, harassed, and annoyed their employés and the persons with whom they were transacting business; that they have had said employés followed day and night, so that wherever one of them went, he was dogged, sometimes by one, but generally by two of the employés of said association—some of said followers being armed with guns and rifles, some of them being unarmed; that whenever the employé of the appellees undertook to converse with a farmer or other probable purchaser, such conversation would be interrupted by the said followers, and the latter would undertake to dissuade such probable purchaser from purchasing goods of the appellees, suggesting that they ought to purchase of resident dealers who resided in the community; that the said follow-

ers were not undertaking to sell any buggies or wagons, nor did they claim to represent any competitor of the appellees or any dealer in buggies or wagons; that the sole object and purpose was in all cases to prevent the appellees from making sales, to the end that they might be driven out of business in the state of Washington; that said followers undertook and have undertaken to persuade purchasers to violate their contracts, whereby they have purchased goods from the appellees; that several of such followers, at the instance of said association, have been appointed deputy sheriffs, and one of the agents of the appellees was arrested upon a false and malicious charge of peddling goods without a license by one of the said followers so appointed a deputy sheriff, all at the instance of the association, and in furtherance of said conspiracy; that said conduct on the part of the agents of said association has been carried on for several weeks and numerous sales have been lost as a result thereof, and the employés of the appellees have become alarmed and discouraged, and will, unless said acts of said followers are stopped, quit the employment of the appellees, and the appellees will be unable to further carry on their business in the state of Washington; that, in pursuance of such nefarious scheme, the association has circulated false and slanderous matter concerning the appellees and their buggies and wagons, and have falsely stated that the latter are of inferior quality, and are being sold at a price greatly in excess of prices charged by local dealers, all of which is false and known to be false by the appellants, and that they have circulated stories to the effect that the appellees and their employés are perpetrating frauds on their customers in various ways, which the bill proceeded to set forth.

The bill alleged "that there is no adequate remedy at law, that the value of the matter in dispute exceeds, exclusive of interest and costs, the sum of more than \$25,000, and that your orators have been damaged by the said acts and conduct of said defendants in excess of the sum of \$25,000." After setting forth that the threatened injury would be irreparable unless stayed by the court, the bill prays for an injunction and for judgment against the appellants for \$25,000, and for such further relief as shall be just and proper. With the bill affidavits were filed. Thereafter further affidavits were filed when the matter came on to be heard on the application of the appellees for an injunction pendente lite upon the bill and the affidavits of the appellees and the counter affidavits of the appellants. Upon consideration of the bill and the facts set forth in the affidavits, the court enjoined the appellants pendente lite "from preceding or following in close range any employé, agent, or servant of the complainants, or the teams used by them or any of them in such manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employés in the free use of the highway, and from in any other manner occupying said highway in such a manner as to hinder, obstruct, harass, annoy, or intimidate the

complainants or any of their employés in the free use thereof; also from approaching or speaking to any actual or supposed customer or customers of the complainants so long as complainants' agents or servants are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale by the complainants; also from resorting to any species of intimidation, force, or fraud, or any conduct that would imply intimidation, force, coercion, or fraud, for the purpose of preventing complainants from selling buggies or wagons and carrying on said business of selling buggies or wagons."

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.¹

The affidavits sufficiently sustained the allegations of the bill and the conclusion of the court below, and showed that the appellants were pursuing a systematic course of interference with the business of the appellees in peddling buggies and wagons in the state of Washington; that as an agent of the appellees would go through the country taking in his train a number of buggies or wagons, the agents of the appellants would follow, generally in pairs in order the better to watch, harass and dog the steps of the peddler. Wherever the peddler would stop, the followers stopped; wherever he lodged, they lodged. As he started out in the morning, they were close in pursuit. Whenever he engaged in conversation with a customer, they would interrupt the conversation and advise the customer not to buy, and "to prevent trouble" the customer would often refuse to buy. The followers in nearly every instance had no vehicles of their own to offer. Their declared purpose was to prevent the appellees' agents from making sales. The result was frequent personal altercations and in one instance a fist fight. The appellees' agents were often intimidated. Some of the followers carried rifles, some of them had been made deputy sheriffs, and, in one instance, one of the appellees' agents was arrested by such a sheriff under the provision of a law which had been declared void by the superior courts of the state of Washington. The proof showed a practical destruction of the business of the appellees in the state of Washington, and that the purpose of the appellants, and it is not by them anywhere denied, was to continue in the course of action complained of.

It is contended on behalf of the appellants that their acts were but the acts of competitors in business, and that they had the legal right to go upon the highways and engage in conversation with any one; and, in general, to do the acts which are complained of. This contention cannot be sustained. The association was a combination of men engaged in various lines of business. It had no property of its

¹ So much of the opinion as relates to questions of jurisdiction and pleading is omitted.

own save the money that was raised for the purpose of interfering with the appellees. It had not, nor had the majority of its members, any buggies or wagons for sale. It did not, as a general thing, send out such merchandise upon the road to offer it in competition with the merchandise of the appellees. Its sole object and purpose, so far as disclosed by this record, was to break up the business of the appellees in the state of Washington.

The appellants contend that their combination in itself was not unlawful, that no unlawful means were used in furtherance of it and that the damage to the appellees, if any they sustained, was the natural and unavoidable result of competition, incident to the carrying on of the appellants' business in a lawful manner. It is to be admitted that the appellees have no right to be protected against competition, and that the appellants have the right to push any lawful trade by all lawful measures and to keep and maintain the benefit thereof, and to exclude others from participation in it if they can. But, while the appellees have no right to protection against competition, they have the right to protection against wanton and malicious interference and annoyance. It is true that the acts of interference complained of in the bill, and proved by the affidavits, were, for the most part committed upon the public highway, but the particular spot upon the highway or elsewhere where the appellees were offering their goods for sale was, for the time being, their place of business.

We do not say that they had any exclusive right to be there, or that the appellants had not the right to go upon the same highway with goods and to follow the appellees' goods with like goods of their own, if they had such, and offer the same in competition with the appellees and to the same customers. But that is not what was done. The appellants' agents took with them no goods, and generally they offered none in competition. Their sole purpose appears to have been to interfere with and prevent sales by the appellees. This they accomplished by breaking in upon conversations, interrupting sales, and making false representations as to the nature of the appellees' goods, and the manner in which they treated the purchasers thereof and other offensive acts. Their purpose was not to sell goods of their own, and thereby interfere with sales by the appellees, but it was, by pursuing a policy of molestation, to drive the appellees out of business and out of the country. The right of competition furnishes no justification for such acts. This is in accordance with the decided weight of authority. *State v. Huegin* (Wis.) 85 N. W. 1046, 62 L. R. A. 700; *Jackson v. Stanfield* (Ind. Sup.) 36 N. E. 345, 23 L. R. A. 588; *Van Horn v. Van Horn* (N. J. Err. & App.) 28 Atl. 669; *Ferd. Heim Brewing Co. v. Belinder* (Mo. App.) 71 S. W. 691; *Ertz v. Exchange Co.* (Minn.) 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433; *Graham v. St. Charles St. R. Co.* (La.) 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99; *Standard Oil Co. v. Doyle* (Ky.) 82 S. W. 271.

Complaint is made that the injunction goes further than the court was warranted in going, in that it enjoins the appellants from approaching or speaking to any actual or supposed customer of the appellees, so long as the latter's agents are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale. This part of the injunction, it may be conceded, trenches upon delicate ground. For the present we are not prepared to say that, in so ordering, the court below was not acting within its discretion, or that substantial rights of the appellants were thereby invaded. The appellees had the right to offer their goods for sale, and to discuss the merits thereof, and the terms of sale. The appellants had no right to prevent them from doing this. If to interfere in conversations was tantamount to preventing the appellees' agents from conducting their business, it was an unwarranted interference.

The order for an injunction pendente lite is affirmed.

GILLY v. HIRSH.

(Supreme Court of Louisiana, 1900. 122 La. 966, 48 South. 422, 20 L. R. A. [N. S.] 972.)

Action by Sidney J. Gilly against Abraham I. Hirsh. Judgment for plaintiff, and defendant appeals.

MONROE, J. Plaintiff represents: That he is engaged in business at 507 Canal street, New Orleans, as an auctioneer selling jewelry and other personal property. That defendant has the adjoining store, in which he also sells jewelry and other wares. That for the malicious purpose of injuring him defendant has hung in his show window, adjoining the entrance to plaintiff's store, a sign, in large letters, reading:

"Don't be Misled.

"This store and window display has no connection with the would-be auction, next door. Our entrance is at the corner."

That the sole object and effect of the sign is to excite the distrust of plaintiff's customers as to the honesty of his business, to his great prejudice, and that he has been damaged to the extent of \$1,500. That defendant has repeatedly reported him to the mayor and police as "a criminal, carrying on an unlawful business, and has maliciously sought to injure his character and his business, and by his said acts and slanderous charges and accusations has damaged petitioner in his character and reputation, in the sum of \$1,000. That unless * * * enjoined from the further display of said sign, and from harassing petitioner, boycotting and picketing petitioner's place of business, and from buttonholing and soliciting the customers entering and leaving, * * * the said Hirsh will inflict upon petitioner, and

upon his business, repeated and irreparable damages and injury, for which no adequate redress could be obtained."

Wherefore he prays for an injunction and for judgment, condemning defendant in damages in the sum of \$2,500.

In answer to a rule nisi, ordering him to show cause why a preliminary injunction should not issue, and by way of answer to the merits and of reconventional demand, defendant admits that he is exhibiting the sign, as alleged, but denies that he is doing so from any malicious motive. And he further denies that he has in any manner harassed plaintiff, or boycotted or picketed his store, or buttonholed or solicited his customers. And he alleges that the sign is necessary for his own protection, for the reason that plaintiff sells at auction, next door to defendant's jewelry store, articles of jewelry and notions upon flagrant misrepresentations as to their origin and worth and at exorbitant prices, being assisted therein by half a dozen or more cappers, or dummy bidders, who are employed to inveigle passers-by into entering said auction shop and bidding on said articles; that defendant recently caused the arrest of one of said cappers as a dangerous and suspicious character, and he was convicted and fined; that said cappers, under the direction of said Gilly, resort to all manner of artifices, both by words and acts, to induce persons who stop at respondent's show window, and who, if unmolested, would become customers of respondent, to enter said auction shop; that the said cappers, among other artifices, represent to said passers-by that said show window of respondent and said auction shop of plaintiff are one and the same place, and that the same grade and character of articles are being sold at public auction, in plaintiff's said shop, as are being displayed in respondent's show window; that the said cappers often " * * * gather around a prospective customer of respondent and rush and crowd him into said auction shop, thus preventing said prospective customer from entering respondent's store, and consequently resulting in damage and injury to respondent, in actual loss of business and in damage to his personal and business reputation, for which respondent reserves the right to sue in a proper proceeding; * * * that the reputation of said auction shop is bad; that it was, and is, necessary for the protection of the reputation of respondent's establishment that he give, by means of some sign, due notice to the public that his store is in no manner connected with said auction shop."

He further, and for the purposes of his demand in reconvention, alleges:

"That he is engaged in the business of retailing jewelry, notions, etc.; * * * that by fair dealing * * * he had built up a remunerative trade, and was continually increasing his business, * * * until about 18 months ago * * * plaintiff established, * * * immediately adjoining respondent's show window, a small shop, * * * where said Gilly and his employes sell jewelry, no-

tions, etc., at auction; * * * that the auctioneer * * * is continually crying out in a loud voice, clapping his hands and making other noisy demonstrations, in his endeavors to attract people from the street, to sell his wares, and to harass respondent, his employés, and customers; that said auction shop is the rendezvous of cappers, loafers, and other dangerous and suspicious characters, who often insult, abuse, and revile respondent and his employés; that the said noise, boisterous conduct, and vile language of said plaintiff, his employés and associates * * * are distinctly audible in respondent's store, and have caused respondent damage, to his health, feelings, and peace of mind, in the sum of \$300; * * * that the said Gilly sells in said auction shop, at public auction, articles * * * of a worthless character; * * * that said Gilly and his said employés take advantage of the proximity of respondent's store, * * * and of the attractive display of first-class goods made by respondent in his show window, to create the impression, by representations to that effect, and otherwise, among respondent's customers, actual and prospective, and the public at large, that said auction shop is part and portion of respondent's store; * * * and that respondent has been damaged, in his personal and business reputation, by being classed and associated with said shop as aforesaid, in the sum of \$1,500; * * * that, by reason of the aforesaid noise, vile language, and disreputable dealings carried on, and of the dangerous and suspicious characters congregated in said auction shop, the same constitutes a public and private nuisance, which should be abated by injunction * * * restraining said Gilly, his agents, and employés from further operating said auction shop."

And he prays that plaintiff's demand be rejected, and that he and his agents and employés be enjoined from further operating said auction shop, from inducing, crowding, or rushing persons from in front of respondent's show window into said auction shop; from representing to persons who stop at respondent's show window, or to any persons, that respondent's store is a part and portion of said auction shop; and from in any manner interfering with the orderly conduct of respondent's business. He further prays for damages, and costs.

After a full hearing in the district court there was judgment as follows:

"Enjoining the said defendant from placing in his show window a sign or card reflecting on plaintiff or his business, and especially the card, 'Don't be Misled. This store and window has no connection with the would-be auction next door'—and enjoining the said defendant from obstructing, interfering with, accosting, and buttonholing plaintiff's customers at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein and there transacting business with plaintiff. It is further decreed that there be judgment in favor of plaintiff in reconvention, and against the said

Sidney J. Gilly, enjoining and restraining the said Gilly, his agents, and employés * * * from inducing, rushing, or crowding persons from in front of the show window of the said * * * Hirsh into the auction store of the said Gilly, from representing to persons who stop at the show window of the said Hirsh, or to any other persons, that the store of said Hirsh is a part and portion of said Gilly's shop, and enjoining the said Gilly from in any manner interfering with the employés and customers of the said Hirsh, * * * dismissing the said Gilly's demand for a moneyed judgment, and also dismissing the said Hirsh's reconventional demand for a moneyed judgment; plaintiff to pay all costs incurred by him, and defendant, in a like manner, all the costs incurred by him, including the testimony of witnesses called in his behalf."

From the judgment so rendered, defendant has appealed, but plaintiff has not appealed, nor has he answered the appeal of defendant, or prayed for any amendment of the judgment.

Defendant's counsel insist:

- (1) That plaintiff is entitled to no injunction.
- (2) That he is not entitled to an injunction restraining defendant from interfering with his customers, picketing his place, etc.
- (3) That defendant is entitled to an injunction as prayed for by him.
- (4) That defendant is entitled to damages.
- (5) That there is error in the judgment appealed from in the matter of the costs.

The evidence shows that plaintiff has a license as an auctioneer, and is engaged in that business next door to the premises occupied by defendant; that he and defendant both sell notions and jewelry; that the jewelry sold by plaintiff is generally inferior in quality and value to that sold by defendant; that plaintiff employs men, who stand about his place, outside and inside, some of whom have interfered with persons who were looking into defendant's show window, and have represented to them that it was part of plaintiff's auction establishment; that defendant himself has, on one occasion, or perhaps oftener, been rudely treated by them, or by plaintiff; and that, on several occasions plaintiff, or those acting for him, have grossly misrepresented to purchasers the quality and value of the goods in his store.

The evidence does not show that plaintiff makes more noise than is usual in that kind of business, or that the noise made by him is such as to constitute his place a nuisance, public or private; nor, on the other hand, does it show that defendant has been interfering with plaintiff's customers in the manner alleged in the petition.

There can be no doubt that plaintiff has the right to conduct an auction business, free from interference on the part of the defendant, so long as he does not conduct it in such a manner as unlawfully to interfere with the business conducted by defendant.

"The law will only permit the abatement of so much of a nuisance

as is necessary to prevent the injury." Wood's Law of Nuisances, § 33. A lawful business, located in a proper place, and conducted in a proper manner, cannot be treated as a nuisance per se, although it may be so conducted, or the surrounding circumstances may be such, as to make it a nuisance. Law of Nuisance (Joyce) § 99.

So far as we can see, the point at which plaintiff's business, by reason of the manner in which it has been conducted, has amounted to an unlawful interference with that of defendant was when plaintiff or his employes molested defendant's customers, actual or prospective, whilst enjoying the privilege of looking into his show window, and undertook to "hustle" or coax them into plaintiff's place, representing that it, and the show window, were parts of the same establishment, and such interference has been enjoined. Whether plaintiff sells goods that are inferior or superior to those of defendant, or whether he deals fairly or unfairly with his own customers, are matters with which defendant has no such concern as would entitle him to shut up plaintiff's place by the writ of injunction.

"The carrying on of banking operations contrary to the statute has been held not to be such a mischief or public nuisance that a court of equity would grant an injunction to restrain the same, even though it had jurisdiction over public nuisances." Law of Nuisances (Joyce) § 85, citing *Atty. Genl. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Atty. Genl. v. Bank of Niagara*, 1 Hopk. Ch. (N. Y.) 354.

Where a merchant undersells or oversells his neighbor, though the latter may suffer damages thereby, it is *damnum absque injuria*. And if he deals unfairly with his own customers, it is a matter between him and them, or between him and the state.

If an auctioneer should be convicted, in a criminal prosecution, of having sold jewelry not of the quality represented by him, and of having refused to return the price, on demand made within 20 hours, or of having offered an article for sale, setting forth its value, and through the aid of mock bidders induced its purchase by a real bidder, and of then having substituted another article in lieu of that offered and sold, his license would be forfeited, and he would be liable to a fine of \$500. Rev. St. §§ 155, 156. But we know of no authority for imposing any such penalty in a civil suit, and what defendant cannot do legally through the courts he cannot do illegally by means of publications or signs, such as that exhibited by him, though he, no doubt, has the right to maintain a sign in his window notifying the public that the window is his, and has no connection with the business carried on next door.

2. We find no evidence going to show that defendant has been obstructing, interfering with, accosting, and buttonholing plaintiff's customers.

3. For the reasons which have been stated, we are of opinion that the injunction, issued in favor of defendant, goes as far as it should.

4. The proof is insufficient to warrant a judgment for damages claimed by defendant.

5. The party cast should bear the costs, and the judgment appealed from must be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, by annulling and avoiding so much thereof as enjoins the defendant "from obstructing, interfering with, accosting, and buttonholing plaintiff's customers, at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein, and there transacting business with plaintiff," and by annulling and avoiding that portion of it which condemns each of the litigants to pay his own costs; and, it is further adjudged and decreed that said judgment be in other respects, affirmed, the defendant to pay the costs incurred in the lower court upon the main demand, and the plaintiff to pay the costs so incurred upon the demand in reconvention. It is further decreed that plaintiff pay the costs of the appeal.

FEDERAL TRADE COMMISSION v. MUENZEN
SPECIALTY CO.

(Federal Trade Commission, 1917. 1 F. T. C. Dec. 30.)

Findings as to the Facts.²

(1) That the respondent, Muenzen Specialty Company, is a corporation organized and existing under and by virtue of the laws of the state of New York, having its principal office and place of business at the city of New York, in said state, and is now and was at all times hereinafter mentioned engaged in selling in interstate commerce hand and electric vacuum and suction cleaners and sweepers and other cleaning and sweeping devices.

(2) That said devices are sold and distributed by respondent in interstate commerce to many customers in various states in direct competition with manufacturers and dealers in such commerce in similar devices.

(3) That the respondent, by extensive advertising in publications circulated in interstate commerce and by correspondence with numerous customers and prospective purchasers in various states, holds itself out to the public as a vacuum cleaner specialist or expert and impartial adviser, stating that it does not manufacture any vacuum cleaners and is not especially interested in any one kind of cleaner, and as such impartial adviser solicits inquiries from said prospective purchasers and the public concerning the merits of various types of cleaners, and invariably recommends the Imperial electric vacuum cleaner or the Eureka electric vacuum cleaner and frequently disparages competitive

² The complaint and the formal parts of the findings and order are omitted.

devices, whereas in fact the respondent is not an impartial adviser, but, on the contrary, is especially interested in the sale of the said Imperial and Eureka cleaners by reason of the fact that the said Imperial cleaner is manufactured especially for the Muenzen Specialty Company, and said company is an agent for the sale of the said Eureka cleaner, and the further fact that the amount of profit on said Imperial cleaner is considerably greater than the profit made on the sale of the majority of the other types of cleaners so advertised by the respondent.

(4) That the respondent * * * holds itself out as a vacuum cleaner specialist or expert and impartial adviser, and as such has demonstrated to prospective customers vacuum sweepers and cleaners produced by various manufacturers, for the purpose of comparing the results obtained by such sweepers and cleaners with the results obtained by cleaners in the sale of which respondent is especially interested; and for the purpose of making such demonstrations has tampered with and failed to properly adjust such competitive cleaners while properly adjusting the cleaners in which it is interested, thus giving prospective customers the impression that such competitive cleaners are less efficient than they are in fact, or that they are not adapted for the use for which they are intended to be put by such prospective purchasers, thus facilitating the sale of the cleaners in which respondent is especially interested.

(5) That the respondent has made false and injurious statements to prospective customers concerning the material of which certain competitive cleaners are constructed and the cost of production of said cleaners, for the purpose of facilitating the sale of cleaners in which respondent is especially interested.

(6) That the respondent, by advertisements extensively circulated in interstate commerce, has advised prospective purchasers to consider the financial condition of manufacturers of vacuum cleaners before purchasing, impressing upon them the difficulty or impossibility of securing repair parts in the event of the failure of such manufacturers and has made statements to such prospective purchasers concerning the reliability and financial condition of various manufacturers, which statements were untrue in fact and calculated to prevent the sale of cleaners produced by said manufacturers, and to facilitate the sale of cleaners in which the respondent is specially interested.

(7) That the respondent, in publications extensively circulated in interstate commerce, has advertised annual and special sales of vacuum and suction cleaners and sweepers, in such a manner as to convey to the public the impression of an unusual or especially advantageous offer for a limited period, whereas in fact the prices during such annual and special sales were no different than the prices obtained before and after such sales.

(8) That the respondent, by extensive advertising in publications circulated in interstate commerce and by correspondence with numerous

customers and prospective customers in various states, has conveyed the impression that the reason for the low prices so advertised is the fact that said respondent purchases in large quantities for cash and sells directly to consumers; whereas in fact the large majority of the sweepers and cleaners so advertised are not purchased in large quantities, but, on the contrary, are sold only when customers insist upon purchasing them instead of said Imperial or Eureka cleaners recommended by the respondent, and the true reason for advertising nonrecommended cleaners at greatly reduced prices is not to supply the demand thus created for such cleaners, but to secure the names and addresses of prospective users of such cleaners, and as a vacuum cleaner expert and alleged impartial adviser to disparage and express unfavorable opinions of such cleaners, and highly recommend the cleaners in the sale of which the respondent is interested, and to thereby effect the sale of said recommended cleaners.

(9) That the respondent, in publications extensively circulated in interstate commerce, has continuously advertised in such a manner as to convey to the public the impression that the regular price of the said Imperial cleaner is higher than the advertised price, whereas in fact the advertised price is no lower than that usually obtained by the respondent which controls the sale of said cleaner.

Conclusions.

That the methods of competition set forth in the foregoing findings as to the facts, and each and all of them, are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Order to Cease and Desist.

It is ordered, that the respondent, Muenzen Specialty Company, cease and desist from—

(1) Representing to the public, directly or indirectly, that it is an impartial adviser and not especially interested in any one kind of cleaner, so long as it is especially interested in the sale of the Imperial electric vacuum cleaner, the Eureka electric vacuum cleaner, or any other sweeping or cleaning device, by reason of the fact that any such devices are manufactured especially for respondent, or that it is an agent for the sale of any such devices, unless special interest is fully disclosed at the time such representations are made.

(2) Tampering with competitive cleaners used in demonstrations or demonstrating with sweepers or cleaners not properly adjusted.

(3) Making false and injurious statements to prospective customers concerning the material of which competitive cleaners are constructed or concerning the cost of production of such competitive cleaners.

(4) Making false statements to prospective customers concerning the

reliability or financial condition of manufacturers of vacuum cleaners calculated to prevent the sale of cleaners produced by said manufacturers.

(5) Advertising annual or special sales of vacuum and suction sweepers and cleaners in such a manner as to convey to the public the impression of an unusual or especially advantageous offer for a limited period, when in fact the prices during such sales are no different than the prices obtained before or after such sales.

(6) Falsely representing or conveying the false impression that respondent purchases vacuum sweepers and cleaners in large quantities for cash and is thereby enabled to sell them at the prices at which they are offered.

(7) Representing or conveying to the public the impression that the regular price of the Imperial electric vacuum cleaner is higher than the advertised price, when in fact the advertised price is no lower than that usually obtained by the respondents for said cleaner:

Provided, that the respondent, the Muenzen Specialty Company, is hereby granted not to exceed 60 days from the date hereof within which to make such changes in its advertising as will enable it to fully comply with this order.

WREN v. WEILD.

(Court of Queen's Bench, 1869. L. R. 4 Q. B. 730.)

BLACKBURN, J.³ This was a rule to set aside a nonsuit, against which cause was shewn in these sittings before my Brothers LUSH and HAYES and myself.

The declaration contained eight counts, to the effect that the plaintiffs made and sold spooling machines, and that the defendant falsely and maliciously wrote to persons in treaty with the plaintiffs for such machines that they were infringements of a patent of the defendant, and that if they were used he would claim royalties for their use, and, if not paid, take legal proceedings; in consequence of which the plaintiffs lost the sale of their machines.

There was no allegation that the defendant did this without reasonable and probable cause, nor, except in so far as might be implied from the terms of the defendant's letters (which, however, were averred to be false), did it appear on the face of the declaration that the defendant had any patent, or was other than a gratuitous intermeddler.

The defendant pleaded not guilty, upon which issue was joined.

On the trial before my Brother LUSH it was proved that the defendant had a subsisting patent. The specification described a very complicated machine, and claimed the whole as a new combination, and

³ The statement of facts is omitted.

also separately claimed many subordinate parts of the machine as new.

The plaintiffs' machine did not comprise in it anything precisely identical with any of those subordinate parts, but so closely resembled them as, at least, to give plausible grounds for contending that they were equivalent to them.

The plaintiffs, it appeared, were negotiating for the sale of their machines to different manufacturers, some of whom, if not all, were already using the defendant's machine under licenses from him. The defendant wrote to them the letters complained of in the declaration. There were then some abortive attempts at arranging the terms of an indemnity to be given by the plaintiffs to their customers; but those going off, the customers refused to buy the plaintiffs' machine with the risk of litigation with the defendant.

The plaintiffs then brought the present action. At the trial the plaintiffs' counsel offered to prove, in addition to the facts above stated, various specifications and machines existing before the date of the defendant's patent, which, according to his contention, would show that the defendant's specification claimed matters that were not new; and also that the defendant had himself used them, and consequently, as it was argued, knew the facts which would render his patent void. My Brother LUSH was of opinion that, inasmuch as the patent was still subsisting, and not set aside on *scire facias* or otherwise, this evidence was immaterial.

Mr. Webster, on the argument before us, contended that this evidence would not only have shewn that the defendant's patent was void, but would also have shewn that the plaintiffs' machines were not an infringement of the patent, inasmuch as, he said, the plaintiffs did not use the whole of anything the defendant claimed; and the evidence would shew that the part they used was not new and therefore not an infringement within the rule laid down in *Sellers v. Dickinson*, 5 Ex. 312; 20 L. J. (Ex.) 417.

The evidence was rejected, and my Brother Lush directed a nonsuit.

The most favourable view for the plaintiffs is to consider whether, if this evidence had been received, and had proved all that it could prove, namely, that the patent of the defendant was void, and that, even if it was good, an action brought on it against those who used the plaintiffs' machine must have failed, and that the defendant, when he wrote the letters, knew the facts which would have produced this effect, there would have been evidence which the judge ought to have left to the jury in support of the issue in the present action. And we think that there would not have been such evidence, and consequently that the nonsuit should not be set aside.

It becomes, therefore, necessary to consider what would support the issue here joined.

No action precisely like this has ever been brought; but there is a well-known action for slander of title, where an unfounded assertion that the owner of real property has not title to it—if made under such circumstances that the law would imply malice, or if express malice be proved, and special damage is shewn, such as, for instance, that a bargain to sell the land is lost—is held to give a cause of action. And we see no reason why a similar rule should not apply where the false and malicious assertion relates to goods, and the damage arises from the loss of a bargain to sell them; and accordingly, in *Green v. Button*, 2 C., M. & R. 707, it was held on demurrer, that a declaration which shewed that the defendant knew that he had no claim, and that his assertion of claim of right was made falsely and maliciously, and without reasonable and probable cause, and that special damage ensued, was good. The case of *Lovett v. Weller*, 1 Roll. 409, and the first resolution in *Sir G. Gerard v. Dickenson*, 4 Rep. 18a, are authorities that, without the allegation of knowledge, or, at least, of want of reasonable and probable cause, the declaration would have been bad. But it is obvious that, where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in common fairness, bound, to give the intended purchaser warning of such his intention; see *Pitt v. Donovan*, 1 M. & S. 639, and, consequently, we think no action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made mala fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.

That an action may be brought under such circumstances as to render it morally wrong and injurious in fact, is certain, though the authorities leave it in doubt whether, under any circumstances, the person so sued can recover damages for the vexation and annoyance caused to him by the false suit.

In a case reported in Maynard's Long Quinto, 5 Ed. IV, f. 126, an action was brought, alleging that the now defendant forged a bond in the name of the plaintiff, and afterwards sealed it in the name of the plaintiff, and sued on it, and recovered on it. It is now quite settled that the fact that the former suit had terminated against the second plaintiff would be fatal to his right to maintain the second action, but that does not seem to have been settled law at the time, and though no decision was come to, the inclination of the Court seems to have been, that for bringing a suit so manifestly wrongful to the defendant's own knowledge, an action might be maintained.

In *Sir G. Gerard v. Dickenson*, 4 Rep. 18a, Cro. Eliz. 196, the point seems to have been considered; and, according to the report by Lord Coke, who was himself counsel in the case, it was resolved, 2, that inasmuch as the declaration shewed that with knowledge the plaintiff

was bargaining to sell his land, and the defendant alleged against her own knowledge that a lease, which was a forgery, and which she knew was a forgery, gave her title to the land, and the bargain was thereby lost, the action lay; and Lord Coke, 4 Rep. at f. 18b, cites the opinion in 5 Ed. IV, f. 126, with approbation. The case seems to have been a peculiarly hard one, as the defendant pleaded that she did not know that the deed was a forgery, and judgment was given against her on the assumption that she did know, because of grounds of special demurrer to the plea.

In *Waterer v. Freeman*, Hob. 266, 267, which was an action for maliciously and vexatiously issuing a second *fi. fa.* whilst the first was unreturned, the Chief Justice says: "If a man sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice." This was not necessary for the decision of the case before the court, but it was by no means irrelevant, and is therefore an authority entitled to weight.

On the other hand, in *Savile v. Roberts*, 1 Ld. Raym. 374, Lord Holt, in delivering the judgment of the Exchequer Chamber, expresses an opinion that no such action would lie without alleging and proving some collateral wrong, as that he was maliciously held to bail, or the like. For this he gives two reasons: First, that a man is entitled to bring an action if he fancies he has a right, which is in accord with Lord Ellenborough's reasoning in *Pitt v. Donovan*, 1 M. & S. 639. But this reason is quite consistent with Lord Hobart's position, that the action will lie where it was certainly known to him that the action was utterly without ground. His second reason is, that the law considers that the party grieved has an adequate remedy in his judgment for costs; and on this the Court of Common Pleas acted in *Purton v. Honnor*, 1 B. & P. 205. But this artificial reason does not apply in the present case, for whether the judgment for costs would or would not have been a recompense to the party sued, it would be none to the plaintiffs for the loss of their bargain if occasioned by a wrongful and malicious threat.

If, therefore, the plaintiffs had given evidence, on which the jury might properly find that the defendant made the communication to the intended purchasers *mala fide*, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiffs; or on which the jury might have properly found that the defendant did not (to use Lord Holt's phrase) so much as fancy he had a right, but, as Lord Hobart says, knew certainly that his claim was utterly without ground of truth, we are inclined to think that it would have been proper to leave that evidence to the jury in support of the plaintiffs' allegation that the defendant's letter was false and malicious; the

question whether that is enough without an express allegation of knowledge or want of reasonable and probable cause being on the record.

But we think that as soon as it was shewn in evidence that the defendant really had a patent right of his own and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action. As the evidence which they tendered was rejected, they are entitled to a new trial if supposing it to have been received, and to have turned out as favourable as possible to the plaintiffs, it would have made a case proper to have been left to the jury. But we think that, supposing everything had been proved which the evidence tendered could have proved, there would have been no case on which the jury could properly have found for the plaintiffs. The whole reasoning of the judges in *Pater v. Baker*, 3 C. B. 831, seems to be strongly in support of this conclusion. The advisers of the plaintiffs seem to have thought it was enough to maintain this action to shew that the defendant could not really have maintained any action, and that if well advised he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained; whereas, as we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a bona fide claim in support of a right which, with or without cause, he fancied he had; but a mala fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

The rule, therefore, must be discharged.

Rule discharged.

BOSTON DIATITE CO. v. FLORENCE MFG. CO.

(Supreme Judicial Court of Massachusetts, 1873. 114 Mass. 69, 19 Am. Rep. 310.)

Bill in equity against the Florence Manufacturing Company, Isaac S. Parsons, George A. Burr and George A. Scott, alleging that the plaintiff corporation was and for three years had been engaged in the manufacture of sundry articles, among which were toilet mirrors, made from a composition, invented and patented by one Merrick, which was capable of being moulded by heat and pressure into various shapes, and that they had applied to this material the trade-mark name "Diatite," by which it was generally known; that the defendant corporation was engaged in the manufacture of toilet mirrors from another material capable of being moulded and pressed, upon which there were no letters patent; that the defendant Parsons was the president, the defendant Burr the treasurer, and the defendant Scott the agent

of the defendant corporation; that Parsons, Burr and Scott, acting as such officers and in the name of the corporation, falsely, fraudulently, and maliciously, and for the purpose of injuring the plaintiff and diverting its trade, represented to the plaintiff's customers that the articles manufactured by the plaintiff under its letters patent were manufactured in infringement of letters patent owned by the defendant corporation, and that the defendant corporation was prosecuting a suit against the plaintiff corporation for such infringement. The bill then set forth specific instances in which persons, in the bill named, who intended to make purchases of the plaintiff, had been deterred therefrom by oral and written representations, of the purport above set forth, made to them by the defendants, and had been induced to purchase of the defendant corporation.

The bill prayed that the defendants might be enjoined from making such representations, and that the defendant corporation might be decreed to account for the profits of its sales made by reason of such false representations.

The defendants demurred, because the plaintiff had not stated a case which entitled it to the relief prayed for.

GRAY, C. J. The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. *Huggonson's Case*, 2 Atk. 469, 488; *Gee v. Pritchard*, 2 Swanst. 402, 413; *Seeley v. Fisher*, 11 Sim. 581, 583; *Fleming v. Newton*, 1 H. L. Cas. 363, 371, 376; *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 238-241; *Mulkern v. Ward*, L. R. 13 Eq. 619. The opinions of Vice Chancellor Malins in *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, in *Dixon v. Holden*, L. R. 7 Eq. 488, and in *Rollins v. Hinks*, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities and with well settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof. *Routh v. Webster*, 10 Beav. 561; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S. 137, and 11 H. L. Cas. 523; *Maxwell v. Hogg*, L. R. 2 Ch. 307, 310, 313; *Gee v. Pritchard*, 2 Swanst. 402.

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name, but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor, and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they

infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. *Barley v. Walford*, 9 Q. B. 197; *Wren v. Weild*, L. R. 4 Q. B. 730.

Demurrer sustained and bill dismissed.

EMACK v. KANE.

(Circuit Court of the United States, 1888. 34 Fed. 46.)

BLODGETT, J. This is a bill in equity, in which the complainant seeks to restrain the defendant Kane from sending circulars injurious to the complainant's trade and business. Both complainant and defendants are manufacturers of what are known as "noiseless" or "muffled" slates for use of school children. The complainant is the owner of a patent issued to one Ebenezer Butler, February 15, 1870, in which the slate was muffled, or rendered noiseless, as it is said, by making a slot through the frame near the outer edge, into which was spirally wound a piece of listing, cloth, or other fibrous material, which would deaden or break the sound of the slate when it came in contact with the desk or any other hard substance; the listing operating to muffle the faces and edges of the frame. Complainant is also the assignee of letters patent granted April 3, 1877, to Francis W. Mallet, for noiseless or muffled slate; the muffling being obtained by encircling the outer edge of the frame of the slate with a strip of wood a little larger than the thickness of the frame, which strip of wood was covered with cloth or other soft material, so as to muffle both the edges and the faces of the slate frame.

The bill also alleges that the defendants are manufacturers of noiseless or muffled school slates—having their place of business in the city of Chicago—under a patent, as they claim, granted March 28, 1877, to Harry C. Goodrich, which was reissued September 26, 1882, with an additional claim. It also appears that this class of goods is sold extensively by both these manufacturers to jobbers, who supply the retail dealers, from whom the slates are purchased for school use; and that the competition between these manufacturers is active and vigorous; that both are seeking to control as much of the trade as possible, or all of it, if they can do so; and that since August 1, 1883, up to the filing of this bill, which was in March, 1884, the defendants have sent out to the trade—that is, to the jobbers and persons engaged in this class of slates—circulars threatening all who should buy from the complainant, or deal in his slates, with lawsuits, upon the ground that the complainant's slate is an infringement of the Goodrich patent as reissued. I do not intend to quote all these circulars, but extracts from a few will illustrate the character of the attacks which the defendants have made upon the complainant's business. In a circular issued September 26, 1882, and sent generally to the trade, occurs the following language:

"What do we propose to do with infringers? Nothing for the present, so far as prosecuting Emack is concerned, and for reasons that the trade will understand. We could stop him, of course, but he would open out the next day in another loft or basement, and under another name, and put us to the expense of another suit, and so on indefinitely. *When we commence suit we want to be sure of damages.* The language of the original patent was somewhat ambiguous, and hence there was some excuse for those who sold it, believing that it was not an infringement. *There can be no mistake now.* The language of the claims could not be made plainer. Any dealer who now sells the Emack slate knows that he is selling an infringement of our patent, and we shall protect ourselves and our friends by holding all who are responsible for royalty and damages."

"To Our Friends: We will say that very few *jobbers* have handled the Emack slate. Failing to sell to the jobbing trade, he went to the leading retailers, and sold them all he could. They, of course, had heard nothing of our claims as to infringement, as we sell only to jobbers. We *now* know every man in the country who handles these slates, and shall notify them all promptly of the reissue of the patent. Then, if they continue to sell, we shall be forced to adopt legal measures."

And in a still later circular, addressed to the jobbing trade, defendants wrote:

"And now once more we say *we shall not sue Emack.* It this be libel, we take the consequences; but we *do expect and fully intend* to bring suits against those who sell infringing slates. * * * The longer we wait, the more royalty and damages we will collect from those who continue to sell infringing slates."⁴

Many more extracts might be made from these circulars, which appear in the proof, but this is enough to show the spirit in which the defendant attempted to intimidate the complainant's customers from dealing with him, or dealing in the slates manufactured by him; and the proof shows abundantly that much business has been diverted from the complainant by these threats and circulars; that the complainant's business has been seriously injured, and his profits very much abridged by the course pursued in sending out these circulars. The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers, for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and after the proofs were taken, and the suits ripe for hearing; the defendants voluntarily dismissed them—the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation,

⁴ The recital of other like statements is omitted.

and not with a bona fide intent to submit the question of infringement to a judicial decision.

The defense interposed is—First, that these circulars were mere friendly notices to the trade of the claims made by defendants as to what was covered by the Goodrich patent; second, that a court of equity has no jurisdiction to entertain a bill of this character, and restrain a party from issuing circulars, even if they are injurious to the trade of another.

In support of this latter point defendants rely upon the opinion of Mr. Justice Bradley, in *Kidd v. Horry*, 28 Fed. 773, and *Wheel Co. v. Bemis*, 29 Fed. 95, decided by Judges Colt and Carpenter in the District Court of Massachusetts. *Kidd v. Horry* was an application for an injunction restraining the defendant from publishing certain circular letters alleged to be injurious to the patent rights and business of the complainant, and from making and uttering libelous and slanderous statements, written or oral, of, or concerning the business of, complainant, or concerning the validity of their letters patent, or of their title thereto, pending the trial and adjudication of a suit which had been brought to restrain the infringement of said patents; and Mr. Justice Bradley in deciding the case said:

"The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as *Dixon v. Holden*, L. R. 7 Eq. 488; *Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, Id. 864; and *Loag v. Bean*, 26 Ch. Div. 306. An examination of these and other cases relied on convinces us that they depend on certain acts of the parliament of Great Britain, and not on the general principles of equity jurisprudence. * * * But neither the statute law of this country, nor any well-considered judgment of a court, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. * * * We do not think that the existence of malice in publishing a libel, or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel; and no cases or authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not."

The principle of this case, concisely stated, is that a court of equity has no jurisdiction to restrain the publication of a libel or slander. But it seems to me the case now under consideration is fairly different and distinguishable from the cases relied upon by the defendants in what seems to me a material and vital feature. In *Kidd v. Horry* the owner of a patent sought the interference of a court of equity to restrain the defendants from publishing and putting in circulation statements challenging the validity of his patent, and of his title thereto, on the ground

that such publications were libelous attacks upon his property. Here the complainant seeks to restrain the defendants from making threats intended to intimidate the complainant's customers under the pretext that complainant's goods infringe a patent owned or controlled by defendants, and threats that if such customers deal in complainant's goods they will subject themselves to suit for such infringement; the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business. While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade, or otherwise, yet, if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem to make a widely different case from *Kidd v. Horry*, and that such acts of intimidation should fall within the preventive reach of a court of equity.

It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the gravamen of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in *Kidd v. Horry*. I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached.

True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be that a court of equity can by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intim-

idate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

The effect of the circulars sent out by the defendant Kane certainly must have been to intimidate dealers from buying of the complainant, or dealing in slates of his manufacture, because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation, and to forego even certain profits, if threatened with a lawsuit which would be embarrassing and vexatious, and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity, and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation. The complainant, as I have already stated, was engaged in the manufacture of school slates under the Butler and Mallet patents; the Butler patent being much older than the Goodrich, and the Mallet patent being nearly contemporaneous with the Goodrich patent, under which the defendant was manufacturing. But the proof in this case shows a still older patent, granted to one Munger, in 1860, for a muffled or noiseless slate, which most clearly so far anticipates the patents of both complainant and defendants, as to limit them, respectively, to their specific devices.

But I do not think the fact that complainant was the owner of these patents or operating under them, material to the questions in this case. The defendants claim that complainant's slates infringe the Goodrich reissue patent, and threaten complainant's customers with suits if they deal in complainant's slates. The state of the art to which the Goodrich patent pertains may be examined for the purpose of aiding the court in passing upon the question of defendants' good faith in making such threats, and the state of the art is only material, as it seems to me, for this purpose. The court will not attempt, in a collateral proceeding like this, to pass upon the validity of the Goodrich patent, but will consider, in the light of the proof as to the state of the art, and the proof as to defendant's conduct, whether the defendant made these threats against complainant's customers because he in good faith believed that complainant's slates infringed his patent, and intended to prosecute for such infringement, or whether such threats were made solely to intimidate and frighten customers away from complainant, and with no intention of vindicating the validity of his patent by a suit or suits. Instead of going into the courts to test the validity of the Butler patent, or the right of complainant to make the kind of slates he was putting upon the market, the defendant, in a bullying and menacing style, asserts to the trade by these circulars, that complainant is

infringing the Goodrich patent, and threatens all who deal in complainant's slates with lawsuits, and all the perils and vexations which attend upon a patent suit.

The average business man undoubtedly dreads, and avoids, if he can, a lawsuit of any kind, but a suit for infringement of a patent is so far outside of the common man's experience that he is terrorized by even a threat of such a suit. There seems to me certainly good grounds for doubting the validity of the Goodrich patent in the light of the state of the art at the time he entered the field; and that any lawyer well versed in the law of patents would surely hesitate to advise that the complainant's slates infringed the Goodrich patent, either before or after the reissue; and the conduct of the defendant in dismissing his suits for such alleged infringement without trial, shows that he did not believe that such infringement could be established.

I am, therefore, of opinion that the complainant has made a case entitling him to the interposition of a court of equity to prevent the issue of circulars, or other written or oral assertions, that the slates made by the complainant are an infringement upon the defendant's patent; and a decree may accordingly be entered as prayed in the bill.

CHAPTER III

DISPARAGING COMPETITOR'S GOODS OR SERVICES

HATCHARD v. MEGE.

(Court of Queen's Bench, 1887. L. R. 18 Q. B. Div. 771.)

DAY, J.¹ This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleges two distinct grievances. The first claim was for infringement of the plaintiff's trade-mark, but that was abandoned at the trial. The second claim is contained in paragraph 4, which sets out a distinct cause of action. The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. III, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute.

There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of

¹ The statement of facts is omitted.

title, which is well defined in *Odgers on Libel and Slander*, c. V, p. 137, in the following passage:

"But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shewn injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.²

HARMAN v. DELANY.

(Chancery Court, 1731. 2 Str. 898.)

In an action upon the case for a libel, the plaintiff declared, that he was gunsmith to his Royal Highness the Prince of Wales, and that it having been inserted in the *Craftsman*, that he had had the honour to present him a gun of two feet six inches long, which would shoot

² The concurring opinion of Wills, J., is omitted.

as far as one of a foot longer, and had kissed the prince's hand on being appointed his gunsmith, the defendant, intending to scandalize him in his trade, published an advertisement in these words, "Whereas there was an account in the Craftsman of John Harman gunsmith making guns of two feet six inches to exceed any made by others of a foot longer, (with whom it is supposed he is in fee) this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns in Longacre." After not guilty pleaded, there was a verdict for the plaintiff and £50 damages.

It was moved in arrest of judgment, that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way.

ET PER CURIAM. That is certainly so, and if the defendant had gone no farther, he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him: the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person: and if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive. 1 Mod. 19; 1 Roll. Abr. 63, pl. 30; Cro. El. 343; 1 Roll. Abr. 62, pl. 28; Hetley, 71; Brownl. 151; 2 Mod. 118; 5 Co. 125; Hard. 470; 1 Keb. 293; 1 Roll. Abr. 37, pl. 15; Skinner, 123; Hob. 225; Mo. 627; 2 And. 40; Hutt. 125.

The plaintiff had judgment, the court being of opinion that it tended to discredit him in his business.

YOUNG v. MACRAE.

(Court of King's Bench, 1862. 3 Best & S. 264, 122 Eng. Reprint, 100.)

The declaration, after alleging that letters patent had been granted to the plaintiff Young for an invention of a process for obtaining, by the distillation of bituminous coals under particular conditions, the substance known as paraffine, and also an oil containing paraffine, which letters patent were afterwards, by indenture, vested in him in trust for himself and the other plaintiffs, proceeded thus:

"And whereas, afterwards, and before and at the time of the committing of the grievances hereinafter mentioned; the said letters patent and the said privileges being then vested in the plaintiffs in manner aforesaid, the plaintiffs carried on business in partnership together, and still do carry on business in partnership together, as, amongst other things, manufacturers of and sellers of and traders in paraffine oil, being the oil hereinbefore mentioned as the oil contain-

ing paraffine in the said indenture mentioned, and to which the privileges granted by the said letters patent relate; the defendant, contriving and intending to injure the plaintiffs, before suit, falsely and maliciously composed and published divers and very many false, scandalous and malicious libels of and concerning the plaintiffs as such copartners, manufacturers and sellers, and of and concerning them as and in the way of their trade and business as such manufacturers, sellers and traders, divers of such libels being each composed of a circular and report, such circular being in these words: 'Liverpool, 30th December, 1861 [M.] 500 casks American refined Petroleum Kerosine or Paraffine Oil, manufactured by the Portland Kerosine Company, Portland, United States, and imported by Messrs. Maclean, Maris & Co., merchants, sold by Alex S. Macrae, broker, Liverpool.' And such report being in these words. 'Professor Muspratt's Report. I certify that I have carefully tested the above oil (meaning the said oil in the said libel mentioned, and meaning an oil other than and different from the oil so manufactured, sold and traded in by the plaintiffs as aforesaid), and that I find it a colourless and somewhat aromatic liquid, while Young's Scotch (meaning the said paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate as aforesaid) has a reddish brown tinge, is much thicker, and has a more disagreeable odour than it (meaning the said oil in the said libel mentioned).' I further certify that, in burning the two oils comparatively in the ordinary one shilling lamp, I found the power of the light produced by the American (meaning the said oil in the said libel mentioned) equals four and a quarter wax candles. The sample of Young's (meaning the said paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate) burned under the same conditions in the same lamp, yields, while the lamp remains well filled, a light of nearly the same power as the American, but a feebler one after the oil has burned down to one-half. The difference at this stage I find to amount to nearly the light of one such candle, or say twenty-five per cent., in favour of the Portland Kerosine Company's oil (meaning the said oil in the said libel mentioned). [Signed] Sheridan Muspratt, M. D., F. R. S., Fd. M. R. I. A., &c., &c., Professor of Chemistry.' And divers of such libels being composed only of the said report. Thereby meaning and intending that the said paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate, was oil of an inferior quality to the said oil in the said libel mentioned, and yielded a feebler light than the light yielded by the said oil in the said libel mentioned under like conditions, and yielded and would yield only an amount of light nearly the light of one of such wax candles as in the said libel mentioned less, or nearly or about twenty-five per cent. less, than was yielded and would be yielded under like conditions by the said oil in the said libel mentioned. By reason and in consequence whereof the plaintiffs have

been prejudiced and injured in their said trade and business, and the reputation of the said oil so manufactured by the plaintiffs has been injured and the sale thereof has much diminished and fallen off, and the plaintiffs have thereby lost great profits which they otherwise would have made; and by reason and in consequence of the said premises divers persons, that is to say, &c., who, before the committing of the said grievances, were used to buy the said oil so manufactured by the plaintiffs, ceased to buy the same, and bought the said oil in the said libel mentioned instead thereof; and by reason and in consequence whereof also divers persons, that is to say, &c., who otherwise would have bought the said oil so manufactured by the plaintiffs, were induced to refrain from buying the same, and were induced to buy, and did buy, the said oil in the said libel mentioned instead thereof. And the plaintiffs claim £1000."

Demurrer, and joinder in demurrer.

COCKBURN, C. J. (Our judgment must be for the defendant. I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damages is averred, an action might not be maintained. For although none of us are familiar with such actions still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy.

But then comes the question: Assuming that such an action would lie, does this declaration allege acts to support it? All that appears here is that, falsely and maliciously, the defendant has made representations and instituted a comparison between the plaintiffs' oil and that of some one else. But it may be that all the falsehood consists in this: That the defendant has alleged what is true of the plaintiffs' oil, and what is false of that of some other man, by attributing to that other man's oil a character of superiority which it does not deserve. If the declaration had averred that the defendant falsely represented the plaintiffs' oil to be an oil of a brownish tinge, and of disagreeable odour, when it was neither, and special damage resulted, I am far from saying it would not be a libel. But it may be that the falsehood here consists in a false representation of the superior quality in respect of colour and odour of the oil which the defendant advertised. This action therefore cannot be maintained.

WIGHTMAN, J. I am of the same opinion, although I am not entirely without doubt. What is here complained of was a comparison between the oil manufactured by the plaintiffs and that sold by the defendant. There is no statement in the alleged libel that the article sold or manufactured by the plaintiffs is a bad article; it is only said that it is inferior to that of some one else; and that is consistent with the plaintiffs' article being in itself a very good article. It is argued that special damage is alleged in the declaration; but the special dam-

age only arises from comparison—for the defendant merely said that there was another person whose oil was of a superior quality to that of the plaintiffs.

BLACKBURN, J. What has been said by Lord Chief Justice and my Brother WIGHTMAN are sufficient for the decision of this case. My own impression is that where there is a written depreciation of an article, unless it is a slander actionable in itself, no allegation of special damage will render it actionable, except in the case of slander of title. But there may, as my Lord says, be cases where there is a scienter on the part of the defendant who has made statements doing mischief, and calculated to do it, in which an action would lie. But even if that were otherwise I agree that this action will not lie.

Edward James asked for leave to amend.

COCKBURN, C. J. You can bring another action, and perhaps get another professor to make a report in favour of your oil.

Judgment for the defendant.

WESTERN COUNTIES MANURE CO. v. LAWES CHEMICAL MANURE CO.

(Court of Exchequer, 1874. L. R. 9 Exch. 218.)

Declaration, that at the time of the committing, &c., the plaintiffs carried on business as manufacturers and sellers of artificial manures, and had upon sale certain artificial manures and the defendants also carried on business as manufacturers and sellers of artificial manures, and had on sale certain artificial manures; that the defendants well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their business, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, the words following:

“Chemical Laboratory, University of Glasgow, January 29, 1873—
Dear Sir: I enclose herewith analyses of your four samples of manure, which differ much in quality. They are all mixtures and do not consist of bones and acid alone. No. 2 (meaning thereby the defendants’ artificial manures) is much the best, and seems to contain some kind of phosphatic guano. No. 4 (meaning thereby the plaintiffs’ said artificial manures) appears to contain a considerable quantity of coprolites, and is altogether an article of low quality, and ought to be the cheapest of the four. The other two are fair articles and may be usefully employed. It is not for me to put an exact value upon the samples, as the prices charged for manures in different parts of the country differ to an extraordinary extent. I know places where No. 2 (meaning the defendants’ said artificial manures) would be sold at

about £8. per ton, others, where £7. would be its price. I may state, however, the relative values thus: Suppose the price charged for No. 2 (meaning the defendants' said artificial manures) to be £8. per ton; then No. 1 should be worth £7.; No. 3 £5. 10s; and No. 4 (meaning the plaintiffs' said artificial manures), £5. Of course these must be taken as approximation only, and may be modified by the nature of the bargain; but they should be in these proportions."

[Then followed an analysis in detail, purporting to shew the proportion of phosphates and ammonia in the plaintiffs' and defendants' artificial manures respectively.]

Meaning thereby, that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants. Whereas, in truth and in fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants. And by reason of the premises [Here followed an allegation of special damage].

Demurrer and joinder.

June 9. BRAMWELL, B. In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this—that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libeling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants."

I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises,

certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young v. Macrae*, 3 B. & S. 264. When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favour of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "*ubi jus ibi remedium*." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C. J., in his judgment in *Malachy v. Soper*, 3 Bing. N. C. at page 386. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shewn. Com. Dig. tit. "Action on Case for Defamation," G, 11.

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were con-

triving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy v. Soper*, 3 Bing. N. C. 371, *Evans v. Harlow*, 5 Q. B. 624, and *Young v. Macrae*, 3 B. & S. 264, I would only observe that, in the two first-mentioned cases, there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother BRAMWELL. Moreover, there the Chief Justice in his judgment, 3 B. & S. at page 271, supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

Judgment for the plaintiffs.

WHITE v. MELLIN.

(House of Lords. [1895] App. Cas. 154.)

The respondent was the proprietor of Mellin's food for infants, which he sold in bottles enclosed in wrappers bearing the words "Mellin's Infants' Food." The respondent was in the habit of supplying the appellant with these bottles, which the appellant sold again to the public after affixing on the respondent's wrappers a label as follows:

"Notice.

"The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1 lb. net weight, at 7½d. each, or in 7 lb. packets 3s. 9d. each. Local agent, Timothy White, chemist, Portsmouth."

The appellant was the proprietor of Vance's food. Discovering this practice, the respondent brought an action against the appellant, claiming an injunction to restrain him and damages.

At the trial before Romer, J., the plaintiff proved the above facts, and called two analysts and a physician the result of whose evidence is stated in Lord Herschell's judgment. Briefly, they testified that in their opinion Mellin's food was suitable for infants, especially up to the age of six months, and persons who could not digest starchy matters, and that Vance's food was unsuitable for such beings, nay

pernicious and dangerous for very young infants. At the close of the plaintiff's case, Romer, J., being of opinion that the label was merely the puff of a rival trader and that no cause of action was disclosed, dismissed the action with costs. The Court of Appeal (Lindley, Lopes, and Kay, L. JJ.) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial. [1894] 3 Ch. 276.

Feb. 14. LORD HERSCHELL, L. C. (after stating the facts). My Lords, in the Court of Appeal Lindley, L. J., stated the law thus: "If upon hearing the whole of the evidence to be adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff, this action will lie."

Lopes, L. J., said: "All I desire to say is that, in my opinion, it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person and causing such other person damage, or likely to cause such other person damage."

None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff; but I think it must be taken that they had arrived at the conclusion that that evidence did bring the case within those statements of the law. Of course, if the plaintiff, on his evidence, had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant; the action was in that case properly dismissed. I take it, therefore, that although the learned judges did not analyse the evidence or make any reference to it, they must have concluded that it established a case coming within the law as they laid it down. My Lords, as I understand, in the view of those learned judges, or in the view of Lindley, L. J., to take his statement of the law in the first place, it was necessary in order to the maintenance of the action that three things should be proved: That the defendant had disparaged the plaintiff's goods, that such disparagement was false, and that damage had resulted or was likely to result. Now, my Lords, the only statement made by the defendant by means of the advertisement is this: That Vance's food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms not only to the respondent's infants' food, but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

I will state what I understand to be the result of the plaintiff's evidence. Mellin's food for infants and invalids is a preparation of such a nature that the food is said to be predigested, and therefore not to make that call upon the digestion which food ordinarily does; that as regards children under six months of age Mellin's food is the only one which could be suitably used in the place of the ordinary means of nourishment, the mother's milk, and that any farinaceous food would at that age be not only not nutritious, but prejudicial. And so far, accepting the plaintiff's evidence for this purpose, there being no evidence to the contrary, the plaintiff, I think, establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that as regards these children of very tender age Vance's food or any other farinaceous food would be not only more healthful and nutritious, but as healthful and nutritious.

But then it appears that when a child has passed the age up to which nutrition at the breast may ordinarily be said to continue, the use of some farinaceous food is not only not prejudicial but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this predigested food. That, my Lords, I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that this other preparation—Vance's—is more nutritious and healthful for infants and invalids? I put aside the question of invalids; upon that there was no evidence at all. The plaintiff did not say that his was more healthful, or that the defendant's was not more healthful. It is therefore unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

The word "infants" is not in ordinary parlance confined to children of very tender age. If one looks at its derivation etymologically it would apply to children so long as they are not able to articulate distinctly—not able to speak—and nobody would hesitate to refer to children, I should say, at least under two years of age as infants, just as much as they would to children under six months of age. Therefore, if you look at the class of infants as a whole, it is by no means shewn that the statement that Vance's food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but looking fairly at the language used and the meaning to be attributed to it, I am not satisfied that it has been shewn that by means of this advertisement the defendant falsely disparaged the plaintiff's goods.

But, my Lords, assuming that he did so, the Court of Appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not state that he had sustained any injury, nor did he even say that it was calculated to injure him, and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence; on the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that any one buying this bottle at the chemist's would be led to believe that Mellin's food, which he had bought, was not a good article, or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better?

My Lords, why should people give such a special weight to this anonymous puff of Vance's food, obviously the work of some one who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley, L. J., gives.

Lopes, L. J., adds the word "maliciously," that "it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published bona fide merely to sell the advertiser's own goods, or at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended by the addition of the word "maliciously." Both those are certainly absent here. There is nothing to shew that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to shew that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present is the case of the Western Counties Manure Company v. Lawes Chemical Manure Company, L. R. 9 Ex. 218, in which case a declaration was held good

which alleged the disparagement of the plaintiffs' goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to the decision as material and essential. In the earlier case of *Evans v. Harlow*, 5 Q. B. 624, a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff and of and concerning him in his said trade and of and concerning his design as follows."

In that case there was no allegation of special damage; there was a demurrer to the declaration, and the declaration was held bad. Now, the only distinction that I can see between that case and the case of the *Western Counties Manure Company v. Lawes Chemical Manure Company*, *supra*, is that in the latter case special damage was alleged, whereas in the former it was not. Bramwell, B., does not call specific attention to the differentia between the case before him and the case of *Evans v. Harlow*, *supra*, but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. Pollock, B., who was the other judge, pointed out that in *Evans v. Harlow*, *supra*, there was no allegation of special damage. Therefore, my Lords, the utmost that the *Western Counties Manure Company v. Lawes Chemical Manure Company*, *supra*, can be claimed as an authority for is this, that an action will lie for falsely disparaging another's goods where special damage results. *Evans v. Harlow*, *supra*, is a distinct authority that it will not lie where special damage does not result. In the present case it cannot be pretended that any special damage was either alleged or proved.

Mr. Moulton sought to extricate himself from that difficulty in this way: He said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages but a claim for an injunction, and that although it may be that to support an action for damages it would be necessary to allege and prove special damage, that is not necessary where an injunction is claimed—that it is enough if a false statement is made and is likely to be repeated.

Now, my Lords, no authority was cited to shew that a court of equity under any of the branches of its jurisdiction had ever granted or would grant an injunction in such a case. Certainly there is no rule of equity under which it may be said generally that a court of equity would restrain every publication of a false statement. In the case of *Canham v. Jones*, 2 V. & B. 218, the bill stated that a certain Mr. Swainson had been the sole proprietor of a secret for preparing the medicine called "Velno's Vegetable Syrup," and that the plaintiff had obtained title to it under his will and had sold the medicine.

Then the complaint was that the defendant, who had been a servant of Swainson, was employed in the preparation of the syrup but was not acquainted with the complete preparation, certain essential ingredients being introduced only by Swainson himself and only in the presence of the plaintiff. Then it alleged "that the defendant being discharged from his service had made and advertised for sale a spurious preparation under the name of Velno's Vegetable Syrup, stated by him to be the same medicine in composition and quality as that made by Swainson and the plaintiff, the defendant's advertisement certifying that the medicine prepared by him at his residence under the name of Velno's Vegetable Syrup is precisely the same with that made and sold by the late Mr. Swainson." It was alleged that that was untrue, and that it was a spurious preparation pretending to be the same when it really was not. To that bill the defendant put in a general demurrer for want of equity. That demurrer was sustained by the Vice Chancellor, Sir Thomas Plumer, although for the purposes of that demurrer it was taken that the defendant selling this article was falsely stating that it was the same as the plaintiff's.

My Lords, the learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked at, it will be seen that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a court of common law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a court of common law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82d sections of the Common Law Procedure Act 1854 undoubtedly conferred on the courts of common law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation"; and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in *Bonnard v. Perryman*, [1891] 2 Ch. 269.

My Lords, obviously to call for the exercise of that power it would be necessary to shew that there was an actionable wrong well laid, and if the statement only shewed a part of that which was necessary to make up a cause of action—that is to say, of special damage was necessary to the maintenance of the action, and that special damage was not shown—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plain-

tiff would not be entitled to an injunction, any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed; and for the reasons which I have given, taking the *Western Counties Manure Company v. Lawes Chemical Manure Company*, L. R. 9 Ex. 218, to be good law, he has not brought himself within it.

But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods.

In *Evans v. Harlow*, 5 Q. B. 624, Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action."

My Lords, those observations seem to me to be replete with good sense. It is to be observed that *Evans v. Harlow*, 5 Q. B. 624, does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson, J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman, J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to litigation, and that the courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course

"better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans v. Harlow*, 5 Q. B. 624, was decided in the year 1844, somewhat over half a century ago, and the fact that no such action—unless it be *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218—has ever been maintained in the courts of justice is very strong indeed to shew that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the conclusion that the judgment of the court below cannot be sustained, even assuming the law to be as stated by the learned judges; but inasmuch as the case is one of great importance and some additional colour would be lent to the idea that an action of this description was maintainable by the observations in the court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

Upon the whole, therefore, I think that the judgment of Romer, J., was right and ought to be restored, and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.

Order of the Court of Appeal reversed. Judgment of Romer, J., restored, with costs here and in the Court of Appeal. Cause remitted to the Chancery Division.³

³ The concurring opinions of Lords Watson, Macnaghten, Morris, and Shand are omitted.

TOBIAS v. HARLAND.

(Supreme Court of New York, 1830. 4 Wend. 537.)

Demurrer to declaration. The declaration, after stating, by way of inducement, that the plaintiff used and exercised the trade and business of a manufacturer of patent lever watches, called S. J. Tobias & Co.'s patent lever watches, and that the defendant was a dealer in patent lever watches manufactured by M. J. Tobias and Robert Roskell, and by other persons, averred that the defendant intending to defame and slander the plaintiff, and to injure and prejudice him in the use and exercise of his trade and business of a manufacturer of patent lever watches, falsely and maliciously spoke and published of and concerning the plaintiff in his said business, the following words: 1. Tobias' watches (meaning the watches manufactured by the plaintiff) are bad. 2. S. J. Tobias & Co.'s watches are bad. 3. S. J. Tobias & Co.'s watches are inferior watches. 4. Tobias' watches are inferior watches. 5. This watch (meaning a patent lever watch which he held in his hand, and which had been manufactured by the plaintiff) is not a good watch. 6. This watch (meaning, &c., as in the last count) is an inferior watch. 7. This watch (meaning, &c., as in last count) is a bad watch. 8. S. J. Tobias' watches (meaning the watches manufactured by the plaintiff) are inferior to M. J. Tobias' and to Roskell's. 9. This watch (meaning a watch he held in his hand manufactured by the plaintiff) is inferior to M. J. Tobias' and to Roskell's—and concluded by averring that by means of the speaking and publishing of the said words the plaintiff was greatly injured and prejudiced in his trade and business, and divers citizens, since the speaking and publishing of the words, had refused to purchase the watches manufactured by the plaintiff, and so the plaintiff was deprived of great gain and profit.

The words were set forth in nine distinct counts. There were nine other counts similar to the above, except that it was stated that the plaintiff was an importer and dealer in a description of watches called S. J. Tobias & Co.'s patent lever watches, manufactured expressly for the plaintiff at Liverpool; that large quantities of such watches were annually sold by him; that at the time of the speaking of the words the plaintiff had on hand and was the owner of a large number, to wit, 1,000 watches of the value of \$200,000; that the defendant, being a dealer in similar watches manufactured by M. J. Tobias, Robert Roskell and others, and intending to defame and slander the plaintiff, and to injure and prejudice him in his trade and business of an importer and dealer of such watches as aforesaid, spoke and published the same words set forth in the first set of counts; which words were set forth with averments and innuendoes. These counts concluded with averring the same injury as set forth in the conclusion of the first

counts, with the addition that the plaintiff was hindered and prevented from selling and disposing of the watches he had on hand.

To this declaration the defendant put in a general demurrer, and the plaintiff joined in demurrer.

MARCY, J. Special damages are not so alleged in the declaration that proof of them could be received on the trial. The general allegation of the loss of customers is not sufficient to enable the plaintiff to shew a particular injury. Bull, N. P. 71; Saund. 243, n. 5; 1 Str. 666. If the plaintiff in this suit can recover at all it must be because the words are actionable in themselves. Whether they are so or not is the only question presented by the demurrer.

The words charged do not directly impeach the integrity, knowledge, skill, diligence or credit of the plaintiff. They only relate to the quality of the article which he manufactures, or in which he deals. The words in both sets of counts which relate to a particular watch, and those which are obviously mere comparisons, are clearly not actionable. No instance can be found, I believe, where an action has been sustained on words for misrepresenting the quality of any single article which a person has for sale, unless special damages are alleged and proved. To impute ignorance to an attorney or counsellor in a particular cause, or want of skill to a physician in relation to the disease of a particular patient, is not actionable. Foot v. Brown, 8 Johns. 64; Cro. Eliz. 620. On the same principle, an allegation that a manufacturer has made a particular article bad cannot be a slanderer. A contrary doctrine would, in my apprehension, be exceedingly pernicious. It would render a man liable to be called into court to justify an unfavorable opinion he might express of any manufactured article which another had for sale. It would involve a strange contradiction to hold a man answerable for words imputing defects in an article of merchandise, and to exonerate him from responsibility when he charges his neighbor with a defect or want of moral-virtue, or the neglect of moral duty or obligations. A charge of the moral deficiencies above referred to is declared not to be actionable. 3 Wils. 177.

I do not find that even an attempt has been made to sustain an action on words of comparison. To say that the watches manufactured by the plaintiff are inferior to those made by any other particular manufacturer can never be held actionable where no special damages result therefrom, without embarrassing the freedom of judgment in matters of private concern, and making errors of opinion in relation to the common and necessary transactions of life a fruitful source of litigation.

It only remains to determine whether an action can be maintained for those words which allege that the plaintiff's watches were not good, or were bad. Good and bad are generally terms of comparison. The same article may be called, not inaccurately, good when compared with one of the same kind of a much inferior quality; and it may, with equal

correctness, be characterized as bad when spoken of with reference to the most perfect article of the kind. But suppose the words to be spoken positively, and not comparatively, I do not believe they are actionable per se. The cases referred to on the argument for the plaintiff do not go far enough to support the action in this case. Those which seem to give the most countenance to this action relate to charges against brewers. It is true that in England it has been held actionable to say of a brewer that he makes unwholesome beer (*Freeman's Rep.* 25; 1 *Vin. Abr.* 477); but that case is put expressly upon the ground that it is a statutable offense to make and sell such beer. It is very evident, from the language of the court, that if the charge had not imputed to the plaintiff deceit or malpractice in adulterating his beer, the words would not have been adjudged actionable in themselves. In the case of *Dixie v. Fenn*, Sir Wm. Jones, 444, the words were spoken of the beer made by the plaintiff, and were extremely disparaging, but they were held not to be actionable. They represented the beer to be worthless, but not unwholesome. The case which most resembles the present is one found in 12 *Mod.* 420, wherein the words charged were, "The defendant keeps nothing but rotten goods in his shop." The court say, if the words were only that he had rotten goods, the action would not lie; for the slander is, to have nothing but rotten goods. It appears to me that this case proceeded upon the ground that the words imputed deceit or malpractice; hence the distinction which the court make between having rotten goods and nothing but such goods. If he had nothing but rotten goods, he must of necessity practice an imposition upon all who dealt with him. The case of *Tobart v. Tipper*, 1 *Campb.* 330, was for a libel, and the rules in such a case differ from those that govern slanderous words spoken; but even in that case the report shews that something more than the imputing to the plaintiff the publication of an absurd poem was contained in the charge. All of the piece complained of is not, I believe, stated; and I infer from some of the remarks of Lord Ellenborough that the action was not maintained for characterizing the plaintiff's work as absurd, but for imputing to it an immoral tendency. It was not represented as merely good for nothing, but as having noxious qualities. The question submitted to the jury was whether the defendant, by the publication, intended to put down a nuisance to public morals, or to prejudice the plaintiff. Nothing can be drawn from that case to establish a principle that will sustain this.

It appears to me, that when the words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable, per se, they must import that the plaintiff is guilty of deceit or malpractice in the making or vending of them. The words used by the defendant here do not import such charge, nor do they amount to a charge of the want of skill. They do not assert that the defendant could not make or did not deal in good

watches, or that he practiced any deceit in making them by which purchasers were imposed on.

The principle on which this action must be sustained, if it be sustainable, would make a new class of words actionable; and when applied, as it would be, to the business communications of every description of citizens, its practical effects would, in my judgment, be alarming.

Judgment for defendant.

EVERETT PIANO CO. v. MAUS.

(Circuit Court of Appeals of the United States, 1912. 200 Fed. 718, 119 C. C. A. 162.)

Suit in equity by the Everett Piano Company against Henry P. Maus. Decree for defendant, and complainant appeals.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This suit was brought for alleged unlawful interference with complainant's sales of pianos. Complainant averred that it had for years manufactured and sold pianos under the trade-name of Everett, and had not only established the name as a trade-mark, but had also, in 1905, caused the name to be registered according to the laws of the United States. The interference averred is, in substance, that defendant, while engaged in buying and selling pianos other than the Everett, was advertising and representing to the public, and to prospective purchasers of pianos, that defendant was able to procure from the factories of complainant new Everett pianos, and to sell them at a price far below their real or market value; that to deceive the public and prospective purchasers, and to injure, damage, and discredit the reputation and standing of, and the demand for, Everett pianos, as also to injure complainant's reputation and business, defendant keeps at his place of business an Everett piano, which he has permitted to become and remain in an "untuned and poorly voiced condition, so that the music produced from said piano is greatly inferior in quality and tone to the music of an Everett piano in good condition"; that he represents the condition, quality, and music of all Everett pianos to be similar in such respects to this one, which he also represents "to be a new Everett piano, just recently received from complainant's factory"; and that defendant knows all of such advertisements and representations to be false. The relief prayed is an injunction and damages. Demurrer was filed, stating as grounds that the court had no jurisdiction of the subject-matter, and that the bill does not set forth facts sufficient to constitute a cause of action or to entitle complainant to the relief prayed. The demurrer was sustained and an appeal taken.

We think that the bill states nothing more than a trade libel, and consequently that it does not state a case for the interposition of a court of equity. *Kidd v. Horry* (C. C.) 28 Fed. 773, per Justice Bradley.

The bill, in its averments, fails in a number of particulars respecting well-known grounds for equitable interference. It does not state a case of unfair competition, because it is not averred that defendant has attempted to palm off any other kind of piano as that of complainant. *Edward Hilker Mop Co. v. U. S. Mop Co.*, 191 Fed. 613, 618, 112 C. C. A. 176 (C. C. A. 6th Cir.), and cases there cited. It does not state a case of infringement of complainant's trade-mark (*Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60), nor a case of boycott, as abundantly appears in the case relied on in that behalf (*Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 437, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874). It falls far short of stating a case of the class to which *Emack v. Kane* (C. C.) 34 Fed. 46, belongs, or *Commercial Acetylene Co. v. Avery Portable Lighting Co.* (C. C.) 152 Fed. 642. See, also, *Acme Acetylene Appliance Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 112 C. C. A. 573 (C. C. A. 6th Cir.). A multiplicity of suits (*Boise Artesian Water Co. v. Boise City*, 213 U. S. 286, 29 Sup. Ct. 426, 53 L. Ed. 796) is not threatened, or at all probable; nor is any showing made that the wrongs averred cannot be redressed in a court of law.

The decree below is affirmed, with costs.

MARLIN FIREARMS CO. v. SHIELDS.

(Court of Appeals of New York, 1902. 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310.)

Action by the Marlin Firearms Company against George O. Shields. From an order of the Appellate Division (74 N. Y. Supp. 84), reversing a judgment for defendant sustaining a demurrer to the complaint, defendant appeals.

PARKER, C. J.⁴ The plaintiff corporation, which manufactures Marlin repeating rifles, brought this action to perpetually restrain defendant, the proprietor of a magazine called "Recreation," from publishing "any article or statement, in any form or under any guise, falsely attacking, misrepresenting, or depreciating plaintiff's said rifle, or its accuracy, effectiveness, merit, or value." Defendant demurred to the complaint, and the question presented on this review is whether it states a cause of action. The following is as brief a synopsis of it as will suffice to present fully the question before us:

Plaintiff is engaged in the manufacture and sale of the Marlin repeating rifles, which have become well known as a distinct model throughout the United States and elsewhere, and for some time it advertised the rifles in defendant's magazine. Defendant having advanced his rates, plaintiff withdrew the advertisement, whereupon defendant published letters, purporting to be from correspondents, re-

⁴ Part of the opinion is omitted.

flecting on the rifle; such publications taking place, one in March and two in October, 1899, and one in September and another in November, 1900. These letters were not in fact written by correspondents, but were sham letters, written and published by defendant in furtherance of a design to force plaintiff to advertise with him, or, failing in that, to gratify his malice. The first letter was complimentary to the Marlin rifle throughout, and contained an expression of surprise that its advertisement no longer appeared in "Recreation," and the same issue contained an answer by the editor in which the reason for the disappearance of the advertisement was stated to be an advance in advertising rates because of increase in circulation, which advance plaintiff refused to pay, and the complaint alleges that the reason assigned by the editor for the absence of the advertisement and the statement as to its circulation are false.

The first of the two letters in the October (1899) issue purports to be written from Montana, and in it the writer says: "I have owned and used a great many Winchester and Marlin rifles of all models. * * * I have come to the conclusion that the Marlin is not to be compared with the Winchester as regards ease, rapidity, or certainty of action, beauty of outline, finish, and all that goes to make up a first class weapon. I consider the first model Winchester a more reliable weapon than the latest Marlin. Some one will ask, Why? And I answer: Because they handle the cartridges perfectly, and as rapidly as the lever can be worked by the operator, under any circumstances, while the Marlin might fail to handle the cartridges if handled with one-half the rapidity of the Winchester. * * * The Marlin has a faulty extractor and ejector"—citing instances in his own experience in support of his assertion and specifying what the Marlin lacks. The letter concludes: "Here is an extract from a well-known Northwestern gun dealer's catalogue which has been in circulation several years: 'I do not manufacture, recommend, or guaranty Marlin rifles. If they chew up the heads of cartridges, clog up in the action and magazine it is not my fault; so do not ship them back on my hands. I have Marlin rifles for sale for those who want them, but when sold and delivered my responsibility ceases.' A good advertisement, truly. I consider any gun that leaves the Winchester factory perfect in every respect, both as regards accuracy and manipulation." The statement that "the Marlin has a faulty extractor and ejector" is alleged to be false, and reasons are given in support of the allegation.

The other letter in that issue contained the following: "Were the Winchester people to take the '86 model frame, and make it light for a .38-55 barrel, and then have a .38-55 Marlin barrel fitted, it would in my opinion be the ideal gun for general work for the man who cannot afford a .30-30 or other late arm. I've used Marlins a good deal, and was always bothered by the side ejector. It is no good, and the extractor in the Marlin is a little weak." The complaint charges that the

statement in this letter that "the side ejector is no good" is false, and, further, that "the side-ejecting system as used by plaintiff is one of the most important improvements of recent development in the art, as shown by plaintiff's successful usage in all of its repeating arms made during the last eleven years."

The letter in the September number, 1900, purporting to be signed by Percy C. Bowker, of Wakefield, Mass., states that, while out squirrel hunting with a friend named Ripley, the latter said his rifle had worn out, and on examination they found that "the little racker that racks the carrier had worn out" after "the rifle had been fired about 800 times." Ripley took the gun to a dealer, who said he did not warrant the Marlin rifle. The letter compared the Winchester with the Marlin, favorably to the former, and stated that the writer did not want the "so-called improvement" in the Marlin, the solid top and side ejector, and expressed the opinion that there is room for great improvement in the Marlin action. The complaint alleges that the statement in this article that "the little racker that racks the carrier had worn out" after "the rifle had been fired about 800 times" is false, and in support thereof further alleges that "the piece referred to is solidly and substantially designed to perform its functions. These parts are made of excellent material, carefully inspected and tested. Similar rifles, that have seen years of hard service and been fired many thousands of times, show no considerable wearing at this time. It would be impossible to wear out the part in the manner and time stated."

The publication of November, 1900, purported to be from a correspondent, and stated, in substance, that the Marlin is handsome, but its place is at the bottom of a list of rifles; "no repeating rifle can handle the long rifle cartridges;" the Marlin extractor is defective; the twist in the barrel is too short, and in a specified gun the carrier became worn out before 500 cartridges were used, which gun also shed gas into the action. These statements the complaint alleged to be false, and assigns reasons at length in support of the allegation. The complaint further alleges that the statements in such several letters have greatly injured the plaintiff in its business of manufacturing and selling its rifles, and have "caused it to lose sales of same to a large extent, but to what extent plaintiff is unable to state." It alleges on information and belief that the defendant intends to carry on said scheme, and to continue to publish in its magazine false and unfounded statements, calculated to slander and depreciate the accuracy, effectiveness, general merits, and value of plaintiff's rifle. It neither asks nor seeks any relief at law for any past publication, but alleges that the plaintiff has no adequate remedy at law, and prays equitable aid by way of an injunction, in order to avoid a succession of suits, and also "because of the impossibility of ascertaining, identifying, or establishing, according to legal principles, any measure of damage," and demands judgment against the defendant that he "be perpetually enjoined and restrained

from publishing, or causing or permitting to be published, in his said magazine or elsewhere, any article or statement, in any form or under any guise, falsely attacking, misrepresenting, or depreciating plaintiff's said rifle, or its accuracy, effectiveness, merit, or value, and generally restraining and enjoining the defendant from continuing to carry out its said wrongful and illegal scheme to force the plaintiff again to advertise its rifle in defendant's said magazine."

As the demurrer to the complaint necessarily assumes that all of the facts alleged therein are true, it must be treated as an established fact that the articles published in defendant's magazine were not written by real correspondents, but by defendant himself, and the natural inclination of all fair-minded men, charged with the responsibility of administering the law, would be to relieve the plaintiff from the annoyance to which it is subjected from wholly unworthy motives, as we must further assume. But equity does not undertake to relieve from all the annoyances caused by those who are inconsiderate of the feelings and business interests of others. On the contrary, it is a general rule, which has some exceptions, that it will not undertake to interfere where a party has an adequate remedy at law, and when it does interfere it is guided by principles of equity, which during the long course of its administration have become established. Concededly there is no precedent in the courts of this state for the interference of equity in a case of this character. Hence it becomes necessary to examine the complaint in the light of the established principles for the purpose of ascertaining whether it states a cause of action.

It should be noted, first, that this complaint contains no allegation of any statement made against the character or conduct of plaintiff. It has not been libeled. The words published in defendant's magazine, and for which defendant is responsible, whether written by him or another, criticise the gun manufactured by plaintiff. They do not charge that plaintiff was guilty of any deceit in vending, or want of skill in manufacturing, the gun. Every statement published and of which complaint is made relates solely to the quality of plaintiff's rifles and their relative desirability, as compared with rifles manufactured by others. Now, it has been the law of this state since the decision in *Tobias v. Harland*, 4 Wend. 537, in which the opinion was written by Judge Marcy, that "when the words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable per se, they must import that the plaintiff is guilty of deceit or malpractice in making or vending them." Where the libel or slander is of a manufactured article, and does not directly impeach the integrity, knowledge, skill, diligence, or credit of the plaintiff, the words are not actionable at law, unless special damage be alleged and proved; and a "general allegation of loss of customers is not sufficient to enable the plaintiff to show a particular injury."

The complaint in this action not only fails to contain allegations of

special damage, but it in terms specifically negatives the claim of special damage by alleging that it is unable to state to what extent it has been injured by said publications. Among the more recent cases in which the doctrine of *Tobias v. Harland* has been recognized and followed are: *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882; * * * *Kennedy v. Publishing Co.*, 41 Hun, 422; * * * *Dooling v. Publishing Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83. * * * We need not stop to consider the reason for the rule, for it has been too long and too firmly established to admit of questioning at this day. The plaintiff's first excuse for invoking the aid of equity—to avoid a multiplicity of actions at law—is evidently not well founded, for plaintiff has not only failed to state facts sufficient to constitute one action at law, but it has affirmatively stated facts which show that it has not an action at law. In such a situation it goes without saying that a court of equity cannot be invoked to aid a plaintiff, unless some other ground for its interference be shown.

Another ground of equity alleged is that plaintiff has no adequate remedy at law, "because of the impossibility of ascertaining, identifying, or establishing, according to legal principles, any measure of damages." That he has no adequate remedy at law is true; for, as we have seen from an examination of the authorities, his complaint indicates that he has no remedy at law whatever. This brings us to the real question of the case,—whether an unjust and malicious criticism of a manufactured article, for which the manufacturer has no remedy at law because of his inability to prove special damage, is the subject of equitable cognizance. The constitutional guaranty of freedom of speech and press, which in terms provides that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press" (Const. N. Y. art. 1, § 8), has for its only limitations the law of slander and libel.

Hitherto freedom of speech and of the press could only be interfered with where the speaker or writer offended against the criminal law, or where the words amounted to a slander or libel of a person or corporation or their property, and the guaranteed right of trial by jury entitled the parties accused of slander or libel to have 12 men pass upon the question of their liability to respond in damages therefor and to measure such damages. But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such a decree, the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the pro-

hibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus a party could be punished for publishing an article which was not libelous, and that, too, without a trial by jury.

While we have pointed out in general terms the limitations of the courts in dealing with slander and libel, we shall confine ourselves on this review to a consideration of those authorities which bear directly upon the question whether equity, which creates neither rights nor liabilities, has heretofore assumed jurisdiction to restrain the publication of criticisms unjustly affecting the merits of articles of property belonging to a plaintiff, when such publication will not support an action at law; for, if such precedent be not already established by the courts of this state, in our view it ought not to be. It was long ago held in this state that a court of chancery has not jurisdiction to restrain the publication of a libel, by injunction, upon a bill filed by a party whose character or business will be injured by the publication. *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368. [The court here reviews *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70, 15 Am. Rep. 674; *Mauger v. Dick*, 55 How. Prac. 132; *Kidd v. Horry* (C. C.) 28 Fed. 773; *Wheel Co. v. Bemis* (C. C.) 29 Fed. 95; *Mayer v. Association*, 47 N. J. Eq. 519, 20 Atl. 492; *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165.]

Our attention is not called to any decisions in this state in suits founded solely on slander or libel for which an action at law could not be maintained, holding a contrary doctrine, nor to any text-writers differing from those cited. [The court here distinguishes *Hovey v. Pencil Co.*, 57 N. Y. 119, 15 Am. Rep. 470; *Croft v. Richardson*, 59 How. Prac. 356; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Beck v. Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Casey v. Typographical Union* (C. C.) 45 Fed. 135, 12 L. R. A. 193.]

Emack v. Kane (C. C.) 34 Fed. 46, which is a decision by a single judge, seems to be authority in support of plaintiff's contention. A very careful examination of it, however, leads to the conclusion that its attempt to overthrow the reasoning of Mr. Justice Bradley in *Kidd v. Horry*, *supra*, was not successful.

Our conclusion from a review of the authorities, therefore, is that all well-considered decisions agree in determining it to be the law that a court of equity has not jurisdiction to grant the relief to secure which this suit was brought.

The order of the Appellate Division should be reversed, and the judgment of the Special Term affirmed, with costs in all courts.

GRAY, O'BRIEN, CULLEN, and WERNER, JJ., concur. BARTLETT and HAIGHT, JJ., dissent.

Ordered accordingly.

ALCOTT v. MILLAR'S KARRI AND JARRAH FORESTS,
Limited.

(Court of Appeal, 1904. 91 L. T. R. [N. S.] 722.)

Appeal of the defendants from the judgment of Grantham, J., at the trial of the action with a jury in Middlesex.

The plaintiff brought this action to recover from the defendants damages for a libel contained in a letter, dated the 14th of May, 1902, written by the defendant Green on behalf of the defendant company.

The plaintiff was a paving contractor, and an importer and seller of American red gum wood blocks for street paving.

The defendant company were importers of Australian wood for street paving, and the defendant Green was managing director of the company.

The letter complained of was written by Green, on behalf of the company, on the 14th of May, 1902, to the Marylebone Borough Council, and a copy of it was sent to each member of the council.

The letter was in the following terms:

"We understand that your council propose laying the roadway of Oxford street with American red gum blocks. We would very strongly recommend that, before deciding upon this, you should pay a visit of inspection to Piccadilly, Waterloo place, Haymarket, and Whitehall, the roadways of which have been paved with American red gum only from six to eighteen months, and are now in a rotten condition. We venture to say that the result of such a visit would certainly remove from your mind any idea of using such material for roadways in your district."

At that time the Marylebone Borough Council were considering a tender from the plaintiff for the paving of Oxford street with American red gum blocks.

The plaintiff alleged that, in consequence of the letter complained of, he had to accept much more onerous terms in the contract for paving Oxford street, which was subsequently made between him and the borough council, than would otherwise have been imposed upon him, and that he had thereby suffered pecuniary loss.

The plaintiff also alleged that the letter was written with the intention of preventing him from obtaining the contract to pave Oxford street, and of injuring him in his business.

The action was tried before Grantham, J., with a jury, and the learned judge asked the jury to say (1) whether the statement was untrue; (2) whether it referred to the plaintiff's wood; (3) whether there was malice in the statement—that is, was it made with the object of injuring the plaintiff; and (4) what damages, if any.

The jury found a verdict for the plaintiff with £250 damages.

The defendants appealed.

COLLINS, M. R. This is an appeal from the judgment of Grantham, J., at the trial of the action with a jury. The action was brought

by the plaintiff to recover damages in respect of a letter which was written by the defendants on the 14th May, 1902, and addressed to a borough council before which a tender by the plaintiff was under consideration. The letter, which was sent to each member of the borough council, was as follows: "We understand that your council propose laying the roadway of Oxford street with American red gum blocks. We would very strongly recommend that, before deciding upon this, you should pay a visit of inspection to Piccadilly, Waterloo place, Haymarket, and Whitehall, the roadways of which have been paved with American red gum only from six to eighteen months ago and are now in a rotten condition. We venture to say that the result of such a visit would certainly remove from your mind any idea of using such material for roadways in your district." This action is brought to recover damages for that libel. The jury, under the direction of the learned judge, found a verdict for the plaintiff with £250 damages.

The learned judge, in his summing up, pointed out clearly to the jury what are the conditions under which an action of this kind can be maintained. The learned judge told the jury that "you may crack up your own goods as long as you like; you may say that your goods are better than anybody else's and that your goods have qualities that others have not. It may be true or untrue, but you are entitled to do that. You have no right to say of your neighbor's goods that they are bad, or rotten, or whatever it may be, if it is untrue, and if damage results to your rival." And at the end of his summing up the learned judge said: "Now, gentlemen, you have paid very great attention to this case. I do not want to weary you by going over all the evidence, and I must ask you to say, first of all, is the statement untrue? Did it refer to the plaintiff's wood? Was it untrue? Was there malice in the statement—that is to say, was it done with the object of injuring the plaintiff and bettering his own case? Mr. Green practically admits it. Was it malicious on their part? And what damages, if any, do you find?"

The question which has been mainly discussed before us on this appeal is whether there was any evidence to go to the jury that the plaintiff suffered any special damage. It has not been disputed that special damage is essential to the cause of action in this case. It seems to me that it would have been impossible upon the evidence for the learned judge to have withdrawn from the jury the question whether the plaintiff had suffered special damage by reason of the letter complained of. There was, in my opinion, evidence fit for the consideration of the jury upon that question, and, the verdict cannot be impeached upon that ground. Then, a broader ground of objection was raised by the appellants. It was contended that upon the face of it this letter was incapable of being a libel, and that the learned judge ought to have directed the jury that the letter was incapable

of being a libel, and that there was no question for them to decide in that respect.

I am not prepared to go to the length of accepting that contention. The ground of the argument was mainly that which was relied on in *Hubbuck & Sons, Limited, v. Wilkinson, Heywood & Clark, Limited*, 79 L. T. Rep. 429, [1899] 1 Q. B. 86. That case was a very special case, and I do not think that it has really any application at all to the present case. There the plaintiffs were manufacturers of paint, and they complained that the defendants were falsely and maliciously publishing in China and Japan copies of a report of experiments testing the paints of the plaintiffs and of the defendants which stated that the defendants' paint had a slight advantage over the plaintiffs' paint, but that for all practical purposes they could be regarded as equal; and they alleged that they had been thereby injured in their business and credit. The defendants applied to strike out the statement of claim as showing no reasonable cause of action. The Court of Appeal held that a statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action; that the allegation that the statement was made maliciously could not convert a statement *prima facie* lawful into one *prima facie* unlawful; and that the allegation and proof of special damage would not improve the plaintiff's case.

That case turned simply upon this: That the mere puffing of his own goods by a trader is not libelous any more than mere abuse is libelous. If it is clear that what is complained of is a mere puffing of his own goods by the defendant, then there is no question for a jury. That was the ground of the decision in that case, and the particular inference that there was mere puffing by the defendant was there drawn. How can we say in the present case that an imputation that the goods of a trader were rotten, and a statement that the result of a visit of inspection "would certainly remove from your mind any idea of using such material for roadways in your district," is not capable of being defamatory of the plaintiff's goods? If that statement is incapable of being disparaging of the goods of the plaintiff, I must say that I do not know what can be said to be disparaging. In my opinion that question could not be withdrawn from the jury. The learned judge could not say that this statement was incapable of being libelous. Mr. Rufus Isaacs referred to the observations of Lord Herschell in *White v. Mellin*, 72 L. T. Rep. 334, [1895] A. C. 154, which he made with reference to the case of *Evans v. Harlow*, 5 Q. B. 624; but when those observations are fairly considered, it is clear that they do not touch the solid foundations of the law upon this matter.

In that case Lord Watson said: "In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and

untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things, be established, it must be held that the defendant has acted within his rights, and that the plaintiff has not suffered any legal injury." That was the old law upon the subject, and it still remains the law; and I do not think that the observations which Lord Herschell made in any way alter that. If special damage is caused which is directly traceable to injurious imputations on the goods of a trader which are untrue, then there is a good cause of action. I think, therefore, that this appeal fails, and must be dismissed.

STIRLING, L. J. I entirely agree.

MATHEW, L. J. I am of the same opinion. The notion that no action will ever lie for disparagement of the goods of a trader has really been condemned in the House of Lords, and it cannot be said now that in no case of disparagement of goods will an action lie. The law, therefore, was correctly stated by the learned judge to the jury, and the jury having found a verdict for the plaintiff, the action is clearly maintainable. I agree that there was evidence of special damage to be left to the jury. This appeal therefore entirely fails, and must be dismissed.

Appeal dismissed.

NONPAREIL CORK MFG. CO. v KEASBEY & MATTISON CO.

(Circuit Court of the United States, 1901. 108 Fed. 721.)

Action for libel. On demurrer to plaintiff's statement.

DALLAS, Circuit Judge. It is not necessary to separately consider the 10 causes which have been assigned in support of the demurrer to the plaintiff's statement. That statement does not, in my opinion, set forth a cause of action, and therefore the demurrer must be sustained. The matters which are complained of as false and defamatory are specified as follows:

(1) It is alleged that in a letter written by the defendants to Edward Atkinson these words were used, "You recommend something which the experience of all practical men demonstrates is a fraud," and that in the same letter there was set forth an alleged statement by a certain customer of the plaintiff relative to the character of the "covering" manufactured by the plaintiff, in these words to wit:

"That it is a short-lived affair; that it warps, twists, chars, and becomes generally disintegrated, useless, and dangerous as a nonheat-conducting cover to be applied to steam pipes."

The averment, by way of innuendo, with respect to this matter, is:

"The said defendants meaning and intending thereby that the plaintiff, in the conduct of its business, was guilty of fraudulent, corrupt, and dishonest methods, and that the covering so manufactured and sold by the plaintiff was inferior in quality and character to the other

coverings, and unsuited for the purpose for which it was sold, and that the use thereof was dangerous, and that the plaintiff, knowing the alleged inferior and dangerous quality thereof, procured the sale of the same by misrepresentations and fraudulent practices."

(2) It is alleged that the defendants published a circular letter containing the following:

"Cork has been recently exploited in various cities of the United States as a steam pipe and boiler covering. When it was first presented for our consideration, we expressed the opinion that, it being organic, it would carbonize, and burn, as hair felt does; that under the most favorable conditions it carried with it an element of danger; and that it could never become a permanent standard material for the covering of heated surfaces. We refer you herein, without further comment, to localities and people that have had practical experience with cork covering, and from the nature of the reports we have concerning the same, feel warranted in continuing to believe that our opinion, as above stated, as to cork's value for covering steam pipes and boilers, was correct."

As to this matter the innuendo is:

"Meaning and intending thereby that the covering so manufactured and sold by the plaintiff was inferior in quality and character to other coverings, and especially to the coverings manufactured and sold by the defendants, and that it was unsuited for the purpose for which it was sold, and that the use thereof was dangerous."

It will be observed that it is only the matter contained in the letter to Atkinson which is averred to be libelous of the plaintiff personally. This, and this alone, it is claimed, touches its character or reputation. But, although the innuendo attributes to it a personal application, I do not think it is capable of such interpretation. In the absence of the word "fraud," it would be impossible to construe the language of the Atkinson letter to be in any sense defamatory of the plaintiff; and it seems to be clear that that word, when read in the light of the context could not reasonably be so construed. It relates, not to the plaintiff, but to the "covering," and the statement is, not that it is a fraud, but that the experience of practical men demonstrated it to be so; and, upon reading further, we find precisely what is meant by this, for the statement from a customer of the plaintiff which is quoted is that it (the covering) is a short-lived affair, etc.; and thus we have the word "fraud" defined as descriptive of a thing which is short-lived, etc., and this definition accords with the sense in which, as a colloquial corruption, that word is sometimes used. The action is, in other respects, not strictly an action of libel, but a special action on the case for disparaging the plaintiff's goods; and, with reference to this view of it, I deem it necessary only to repeat what was said by Lord Denman in *Evans v. Harlow*, 5 Q. B. 624:

"A tradesman who offers goods for sale exposes himself to observations of this kind, and it is not by averring them to be false, scandalous, and malicious and defamatory that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action."

From the whole declaration it plainly appears that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor. But such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts.

Judgment for defendant.

HOLMES v. CLISBY.

(Supreme Court of Georgia, 1903. 118 Ga. 820, 45 S. E. 684.)

Action by J. R. Holmes against J. W. Clisby. From the judgment plaintiff brings error and defendant brings cross-error.

COBB, J. Holmes brought an action against Clisby for libel. The allegations of the petition were in substance as follows:

Holmes and the firm of which the defendant was a member were the only merchants in the city of Macon engaged in the sale of a brand of ladies' shoes known as "Queen Quality." The regular price of this shoe was \$3, but the plaintiff, having a quantity of the shoes on hand which were not selling as rapidly as he desired, advertised in the local newspapers that he would sell the genuine Queen Quality shoes at \$2.65. These shoes had been bought from the manufacturers as perfect goods and of first quality. After the insertion of this advertisement, and after the fact that plaintiff would sell the shoes as advertised had become known to the general public and to the defendant, the latter caused to be inserted in one of the local papers, on several dates beginning with September 9th and ending with the issue of October 2, 1902, the following notice: "Ladies of Macon. Queen Quality. We hereby give notice that the firm of Clisby and McKay is our only authorized agent in Macon for the sale of genuine Queen Quality shoes under our guarantee. Our damaged shoes we sell to certain dealers under an agreement that they shall be sold as imperfect goods; as we are not willing that damaged or second quality shoes of our make shall be offered to the public as first quality, even when the damage is not apparent to the eye. Those who buy Queen Quality shoes of other dealers than those designated by us as our authorized agents will have only themselves to blame for any disappointment or loss that may ensue. Thomas G. Plant Co."

The petition alleges that the defendant intended by the insertion of the article and was understood by those who read it to mean that plain-

tiff was pretending to sell, without authority, the genuine Queen Quality shoes, and thereby to mislead the public and secure trade by false and fraudulent means; that the shoes which plaintiff was selling were imperfect and damaged, and that, while plaintiff had agreed with the manufacturer to sell them as such, he in fact was offering them to the public as shoes of the first quality, when they had latent defects in them undiscoverable to the eye; that plaintiff was unworthy of confidence, and customers should beware of him, as they were likely to be disappointed and lose money. The petition alleges that the article applied solely to plaintiff, was intended so to apply, and was understood by those who read it to so apply. Damages are laid in the sum of \$10,000, but no special damages are averred.

The petition was demurred to on the ground that no cause of action was set forth, and that the conclusions which the plaintiff drew from the article were not justified by the language used. The demurrers were sustained, and the plaintiff excepted. The defendant excepted by cross-bill to the overruling of his plea in abatement, based upon the ground that another suit was pending against a different person based upon the same alleged cause of action.

1. "A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt or ridicule." Civ. Code 1895, § 3832. A publication coming within this definition is actionable without an averment of special damage. But a publication which has the effect merely of disparaging a tradesman's goods is not actionable without an allegation of special damage. *Boyn-ton v. Shaw Stocking Co.* (Mass.) 15 N. E. 507; *Boyn-ton v. Remington*, 3 Allen, 397; *Dooling v. Budget Publishing Co.* (Mass.) 10 N. E. 809, 59 Am. Rep. 83. The controlling question, therefore, to be determined in such a case as the one now under consideration, is whether the publication has a tendency to injure the reputation of the person against whom it is directed, and expose him to public hatred, contempt, or ridicule, or whether its effect is simply to disparage goods which he is offering for sale. It is possible that a publication may have both of these effects. *Dooling v. Budget Publishing Co.*, *supra*. And whenever a publication is susceptible of two constructions, one of which would make it libelous and the other not, it is for the jury to say whether the words are in fact libelous. *Beazley v. Reid*, 68 Ga. 380; *Colvard v. Black*, 110 Ga. 646, 36 S. E. 80.

The plaintiff cannot by innuendo draw from a writing a conclusion not justified by the language used, but it is competent for the plaintiff to explain in this way an ambiguous publication, to point out the intention of the author, and to show wherein the effect of the language was to injure his reputation. *Park v. Insurance Co.*, 51 Ga. 510. And the rule is that a publication must be construed in the light of all the attending circumstances, the cause and occasion of the publication,

and all other extraneous matters which will tend to explain the allusion or point out the person in question. *Colvard v. Black*, 110 Ga. 647, 36 S. E. 80. Words harmless in themselves may become libelous when the circumstances under which they are published are such as to convey a covert meaning to the reader reflecting injuriously upon the reputation of the person to whom they refer. These circumstances, as well as the existence of a motive for using the words in a covert sense, should be considered in determining whether they are libelous when applied to the person to whom they expressly refer, or to whom they must have been intended to refer.

The publication under consideration in the present case was manifestly in disparagement of the shoes which the plaintiff was offering for sale; but it was more than this. When all the circumstances as detailed in the petition are taken into view, a jury would be authorized to say that the author intended, and would be so understood by those familiar with the circumstances, to reflect upon the reputation of the plaintiff, and expose him to public hatred and contempt. A construction of the words in the light of these circumstances, which would make the publication charge, in effect, that the plaintiff was a cheat, and was endeavoring to palm off on the public damaged goods for perfect goods, and that, too, imperfect goods, which contained merely latent defects, would be neither forced nor strained. That the publication was intended to refer to the plaintiff cannot, in view of the allegations of the petition, admit of doubt. If one reading the publication knew that it referred to the plaintiff, knew that he was selling Queen Quality shoes at a reduced price, the inference was irresistible that he was selling damaged goods; and when this is coupled with the further fact that the plaintiff had advertised that his goods were perfect and undamaged, the conclusion is well warranted that the author of the publication intended to charge that the plaintiff's advertisement was false, and that in inserting the advertisement he was guilty of a deliberate falsehood, and intended thereby to cheat and defraud the ladies of Macon who were likely to become his customers. Such a publication, in our opinion, exceeded the bounds of legitimate competition. It is right and proper for tradesmen to puff their own goods to the disparagement of those of others, but they must not allow their zeal to betray them into an attack upon the personal reputation of their competitors for honesty and integrity.

It is not always easy to draw the line between what would be considered legitimate competition and a libelous publication, but the writing complained of in this case was, in our judgment, susceptible of the construction which the plaintiff put upon it. The case of *Behre v. National Cash Register Company*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320, is closely in point. There the publication charged simply that the plaintiff was no longer connected with the National Cash Register Company, and that any contracts made by him for the company

would be void. The court held that these words were susceptible of the construction which the plaintiff put upon them, to the effect that he was endeavoring to represent a company which he had no authority to represent, and was in this manner endeavoring to defraud and cheat the public. There was no allegation of special damage in that case, and the decision was put distinctly on the ground that the publication, construed in the light of the innuendoes laid in the petition, constituted a libel, for which an action for general damages would lie.

The defendant in error relied upon the cases of *Boynton v. Shaw Stocking Company* and *Boynton v. Remington*, both of which are cited above. In each of those cases the publication complained of was held to be merely in disparagement of the plaintiff's goods, and not a libel upon his reputation. It is to be admitted that these decisions are very closely in point. There are, of course, some points of difference between the publications in those cases and the one now under consideration, but these differences are perhaps immaterial. Notwithstanding the very high respect which we entertain for the distinguished court which rendered those decisions, we are unwilling to allow them to influence us to make a decision which, in our judgment, would be unsound.

2. One of the demurrers was on the ground that the publication was a privileged communication. Civ. Code 1895, § 3840, states what kinds of communications are to be deemed privileged under the laws of this state. The only one under which the publication involved in the present case could possibly be deemed to have been privileged is in the following language: "Statements made with the bona fide intent, on the part of the speaker, to protect his own interest in a matter where it is concerned." The petition charges that the publication set forth was false and malicious, and that the plaintiff, in causing it to be inserted in the newspaper, maliciously intended to injure the plaintiff's reputation, and also his trade and business of a shoe merchant. If the communication is properly to be classed as one made in the interest of the defendant, the question whether it is or is not privileged would be dependent upon the intention with which it was published. If bona fide, with the sole purpose of protecting himself, it would be; if otherwise, it would not. This question of intention is a question of fact, to be submitted to and determined by a jury. If published with such an intention as would justify a classification of the communication as privileged, this would be a matter of defense of which the defendant could avail himself by proper plea. See, in this connection, *Pearce v. Brower*, 72 Ga. 243; *Augusta News v. Radford*, 91 Ga. 499, 17 S. E. 612, 20 L. R. A. 533, 44 Am. St. Rep. 53.

3. The plea in abatement alleged that a suit had been brought against the Thomas G. Plant Company for the same cause of action as that set forth in the present petition. A copy of the petition in that suit was attached to the plea. That petition alleged that the defendant published

the article complained of in this case "on the 9th day of September, 1902, and on * * * days immediately thereafter." That, then, was a suit for the publication of the article in question on the day named; what follows the averment of the date being so vague and uncertain that it cannot be considered as an averment of other dates. The present action is based upon the publication of the article named on seven specified days, only one of which corresponds with the time of the publication alleged in the suit against the Plant Company. The two actions therefore are not in all respects identical, and the plea in abatement, which sought to abate the entire suit, and not merely so much thereof as was identical with the suit against the Plant Company, was properly overruled, even if separate actions could not be maintained against persons joining in the publication of a libelous article on the same day.

Judgment on the main bill of exceptions reversed; on cross-bill affirmed. All the Justices concur.

LINOTYPE CO., Limited, v. BRITISH EMPIRE TYPE-SETTING MACHINE CO., Limited.

(House of Lords, 1899. 81 L. T. R. [N. S.] 331.)

This was an appeal from a judgment of the Court of Appeal (Smith and Chitty, L. JJ.; Williams, L. J. dissenting), reported in 79 L. T. Rep. 8, dismissing an application by the present appellants, to set aside a judgment entered for the respondents, the plaintiffs below, and to enter judgment for them, or for a new trial, on the ground that the damages were excessive.

The action was brought by the respondents against the appellants for libel. The words complained of are set out in the report in the court below, and in the judgment of the Lord Chancellor.

The appellants denied that the words constituted a libel and that they were maliciously published.

The action was tried before Lord Russell, C. J., and a special jury on the 25th Feb., 1898, when the following facts were either admitted or proved:

Both the appellants and respondents manufactured and sold type-setting machines, both in England and America.

In the year 1895 one of the respondents' machines and in or about Feb., 1896, four more of such machines were installed in the offices of the Evening Sun newspaper in New York, for the purpose of being tried and if found satisfactory of being retained and used by such paper. The five machines worked satisfactorily, as appeared from a paragraph in the Union Printer and American Craftsman (a well-known trade paper in New York) of the 21 March, 1896, and from other evidence.

Owing to the requirements of the trade union organizations amongst the compositors of New York, the use of these machines constituted the office of the Evening Sun a "machine office" and involved the payment by the proprietors of the Evening Sun of certain sums in the nature of a tax upon the use of machines instead of hand-labour, which they were not prepared to pay, and, on the account alone, at the end of April, 1896, four out of the five machines were not further worked in their offices, the remaining machine continuing to be worked satisfactorily until Oct. or Nov., 1896.

An article in the Union Printer and American Craftsman of the 2d May, 1896, showed that the machines were discontinued as aforesaid, solely on account of the requirements of the trade union, and it was further proved by other evidence. In Oct., 1896, the respondents were requested by the proprietors of the Evening Sun to remove the four machines from their office, and they were in fact removed in Nov., 1896.

The appellants on or about the 9th June, 1898, caused to be sent to the representatives of two newspapers in London, the St. James' Gazette and the Printer's Register, a printed paragraph containing the words complained of. The paragraph was printed by them on slips and was in each case inclosed in a letter from the appellants asking the newspapers to make some use of the paragraph in their columns. The representatives of the two newspapers made inquiry, and the paragraph was not published in either of them. Under these circumstances, the respondents' solicitors wrote to the appellants a letter, dated the 12th June, 1896, calling upon the appellants to give an undertaking to withdraw the statements contained in the paragraph, and on the 16th June the appellants' solicitors replied that the whole of such statements were true, and that their clients took steps to ascertain the accuracy of the statement prior to the issue of the paragraph. At the close of the respondents' case the appellants' counsel submitted that there was no case to go to the jury. The Lord Chief Justice ruled that there was a case for the jury, and left to them questions, in answer to which the jury found: (1) That the paragraph was defamatory; (2) that it was defamatory to the respondents in their business; (3) that it was published maliciously; (4) damages £500. The jury further found, in answer to an additional question put to them by the Lord Chief Justice, after some discussion, that the libel meant to impute that the respondents were knowingly selling worthless machines, and judgment was given by the Lord Chief Justice in accordance with the findings of the jury. No special damage was proved or alleged.

THE LORD CHANCELLOR (HALSBURY). My Lords: This is an action for libel, and it appears to me that the only question with which I am able to deal is, whether the words complained of are susceptible of a meaning which makes them actionable. There is no doubt that if the only meaning which a reasonable man could attach to these

words amounted to a mere criticism of the machine as a mechanical appliance it is not an actionable wrong to publish such a criticism. I think that principle is well established, and I do not think that it requires any authority to establish it. Indeed, I am reluctant to quote authority since in actions for libel it is difficult, if not impossible, to make one case an authority for another, the infinite variety of shades of meaning which forms of expression may convey render the quotation of authority as applied to particular words a dangerous source from which to argue that a particular writing is or is not libellous. For the general principle, apart from particular words, which I have laid down, there is ample authority, and if the tribunal before which such a question comes is able to affirm that no injurious meaning can be attached to a writing, but that it is, as I have said, merely a reflection upon goods or machines, it becomes then a matter of law that such a writing cannot be the subject of an action.

In what I am about to say, and in the two authorities to which I mean to refer, I am not departing from what I have said as to the danger of quoting one writing as decisive of the character that another writing may bear, because the two cases to which I am about to refer illustrate the principle upon which the question of libel or no libel must be solved and not merely the proposition that one was held a libel and the other was not. In *Harman v. Delany*, 2 Stra. 898, the alleged libel was an advertisement, as follows: "Whereas there was an account in the *Craftsman* of John Harman, gunsmith, making guns of 2 ft. 6 in. to exceed any made by others of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town nor ever did make such an experiment (except out of a leather gun) as any gentleman may be satisfied of at the Cross Guns in Long-acre. After 'Not guilty' pleaded, there was a verdict for the plaintiff and £50 damages. It was moved in arrest of judgment that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way." Upon which the court gave the following answer: "That is certainly so, and if the defendant had gone no further, he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say that he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him; the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person; and if bare words are so, it will be stronger in the case of a libel in a public newspaper which is so diffusive. The plaintiff had judgment, the court being of opinion that it tended to discredit him in his business." It will be observed that the whole point of the decision is that it is a reflection upon the plaintiff in the way of his trade, and it is upon that principle

that the court decides. On the other hand, in *Evans v. Harlow*, 5 Q. B. 624, 13 L. J. 120 Q. B., the Court of Queen's Bench decided that a statement that what a tradesman had described as "self-acting tallow syphons or lubricators" were not good for the purpose of which they were advertised, but that anyone who had adopted such lubricators "will find that the tallow is wasted instead of being effectually employed as professed," was not a libel upon the plaintiff.

The principle which distinguishes the two cases (and, as I have said, it is the principle only with which I am dealing, and not the particular words of either of the libels proceeded against) is that while mere criticism upon a manufacture or goods is lawful, an imputation upon a man in the way of his trade is, even without special damage, properly the subject of an action. Now, this being the principle, let us see what, in this particular case, is the alleged libel. It is as follows: "The Empire Typesetter in America.—The Union Printer and American Craftsman, the most wideawake and spirited of American trade journals, has recently contained several references to the Empire Composing Machines, which were installed in the office of the New York Evening Sun with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in February last, and the other four commencing operations on the 9th March last. So short-lived, however, does this installation appear to have been, that we learn the machines were discontinued on Wednesday, the 29th April, and now the Empire Company is in receipt of notice to remove them altogether in the course of a few days. This will be a serious blow for the machine."

The plaintiffs are a company constituted apparently for the express purpose of dealing in the machines in question, and it would be impossible, I think, to distinguish between the rights of an individual or the rights of a corporation to be protected from defamatory matter said of them in the way of their trade, the question being, as I have said, whether the words are susceptible of a defamatory meaning, because if they were it was a question properly submitted to the jury, whether they were defamatory, and the jury are the proper persons to decide. Now, the facts as proved showed that the machines were effective for their purpose, and the paragraph was untrue to the knowledge of those who wrote it. It may be said the untruth is only proof of malice, but I think that the mode of untruly describing what the writer describes as a serious blow for this machine does impute or at all events is capable of imputing that the plaintiff company does supply worthless and bad machines, and why is not that an imputation upon them in the way of their trade? The fallacy of the argument on the other side seems to consist in this—that because the criticism of a particular article may be merely a criticism of it without reference to the vendor or maker of it, it therefore becomes, and must be, only such a criticism. And I think that there is a further fallacy in sug-

gesting that where it is a criticism, even if it does reflect upon the individual it is within the ordinary privilege of free speech, and not the subject of an action.

I think that to each of these two fallacious arguments there are separate replies. As to the first, it is quite possible to make a reflection which, by the mere form of expression, would seem to be only a criticism of goods, but nevertheless would involve a reflection upon the seller or maker. Could it be gravely argued that to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel upon him in the way of his trade? And, if so, would it not be a mere juggle with language to alter the form of that allegation and to say that all the fish in A.'s shop is decomposed? Or to say of a baker that such a baker's bread is always unwholesome? In each of these cases you could adopt a form of speech which would seem only to deal with the article sold or manufactured, but in each case it would certainly tend to, and probably would succeed in, destroying the trade of the person thus referred to. And so with respect to the second argument—which must be kept quite apart from the first—the answer is that the thing done was not a fair exercise of any criticism which from grounds of policy would be privileged, upon the general principle of right of free speech.

But here there is ample evidence that it was not done in the fair exercise of any such privilege, but done maliciously. The jury have found, in answer to the question put by the Lord Chief Justice, that the words were not merely a disparagement of the particular machines in question, but defamatory of the plaintiffs in their business as the vendors of these machines. The jury also said that the defendants published the defamatory libel maliciously, intending to attack and injure the plaintiffs in their business. Something was said about other questions which ought to have been submitted to the jury, but I think the course of the trial rendered it unnecessary and inexpedient to do so. For these reasons I think this appeal ought to be dismissed with costs, and I move your Lordships' judgment to that effect.

LORD MACNAGHTEN. My Lords: I concur in the motion, and in the reasons which have been given for it.

LORD MORRIS. My Lords: I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

DUDLEY v. BRIGGS.

(Supreme Judicial Court of Massachusetts, 1886. 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494.)

This was an action for slander of goods. The plaintiff, in his declaration, alleged that he had been for many years a compiler and publisher of directories of cities, towns, and counties, in the commonwealth and elsewhere; that by care, attention, skill, and faithfulness, and after great labor and expense, he acquired a large number of subscribers among business men and other people throughout the cities and towns of Bristol county, and elsewhere in the commonwealth, for the Bristol County Directory, which he had compiled and published biennially for many years, and until the acts and doings of defendant; that he had, at great labor and expense, acquired a large and valuable list of advertisers in his said directory, from whom, as well as from said subscribers, he obtained a large income, and would have continued to do so but for the acts and doings of the defendant. And the plaintiff further alleged that, according to his usual custom in the compilation and publication of the said directory, he would have compiled and published the same in the year 1885, and had made preparations therefor, but that the defendant and his canvassers, and other servants and agents, in order to injure him, the plaintiff, and to deprive him of the opportunity of compiling and publishing said directory for the year 1885, and thereafterwards, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise injure the plaintiff, knowingly, willfully, falsely, and fraudulently pretended and represented to many persons, and particularly to plaintiff's patrons, the advertisers in said directory, and the subscribers thereto, throughout said Bristol county, that plaintiff had gone out of the business of compiling and publishing said directory; that he had sold out said business to defendant; that the said canvassers and other agents of defendant were compiling the materials for plaintiff's directory the same as formerly, and made other false and fraudulent representations, of which the plaintiff was not then fully informed, and thereby deceitfully and wrongfully induced plaintiff's said patrons, advertisers, and subscribers in and throughout said Bristol county to give to defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor, whereas in truth and fact the representations were wholly false and untrue, etc.; and the defendant did knowingly, wrongfully, injuriously, and deceitfully compile and publish the said Bristol County Directory for the year 1885, and vend and sell the same to plaintiff's patrons; and the plaintiff was thereby prevented from compiling, publishing, and selling his said directory for the year 1885, as he had done before, and thereby lost great gains and profits, and was put to great expense in preparing for said compilation and publication, till he learned of de-

fendant's acts and doings, and will hereafter be prevented from compiling and publishing said directory except at an increased expense, and with diminished profits.

To the above declaration the defendant demurred, for the reason that a legal cause of action had not been set forth, and that it did not appear thereby that the plaintiff had any copyright, monopoly, special or exclusive property or right thereof in or to the publication of the Bristol County Directory, or any directory whatever, or to the patronage of the subscribers thereto, or advertisers therein, or that the defendant was under any duty or obligation to the plaintiff in respect thereof; or that the acts or purpose of the defendant, or the means by which they were accomplished, were unlawful, or that the defendant had committed any wrong against the plaintiff, or any property of the plaintiff. After a hearing in the superior court, upon the demurrer, the same was sustained, judgment entered for the defendant, and the plaintiff appealed.

FIELD, J. The plaintiff in his declaration does not allege that, by the acts of the defendant, he has been deprived of the benefit of any contract he has made, or of any property in existence and in his possession, or that the defendant published his directory for 1885 as a directory prepared and published by the plaintiff, and does not bring his case within such decisions as *Lumley v. Gye*, 2 El. & Bl. 216; *Marsh v. Billings*, 7 Cush. 322; *Thomson v. Winchester*, 19 Pick. 214; *Blofield v. Payne*, 4 Barn. & Adol. 410; *Morrison v. Salmon*, 2 Man. & G. 385; and *Sykes v. Sykes*, 3 Barn. & C. 541. He does not allege that he had any copyright in the previous publications which the publication of the defendant infringed, and the courts of the state have no jurisdiction for infringement of copyright. If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this: that he intended to publish a directory for 1885, whereby he expected to make profits, but by reason of the acts of the defendant he abandoned such an intention, and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property. *Bradley v. Fuller*, 118 Mass. 239.

An attempt has been made to bring this case within what is called slander of goods manufactured and sold by another. *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Exch. 219. This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging the plaintiff's business. We think that the declaration does not show that the business of the plaintiff in publishing a new directory every two years was a continuous business. The directory to be published in 1885 was to be a new compilation and publication. From the nature of the book, perhaps, this cannot well be otherwise. New subscribers and new advertisements were to be obtained. We have been

shown no case where it has been held that a false statement that the plaintiff had gone out of business, or sold out his business to the defendant, was an actionable slander of a person in his trade; but upon this we express no opinion. It may be said that such statements tend to injure a man in his business, because they tend to prevent customers from resorting to him for trade, and to injure the value of the good will of his business.

However this may be, the difficulty is in attaching good will as a valuable thing to the publication every two years of a new Bristol County Directory. Such a directory could be published by anybody. It is, perhaps, a question of degree whether the publication by the plaintiff has been so frequent and regular that there can be said to be a good will that would be protected in law. There is no allegation of any continuing contract, express or implied, of subscribing for or advertising in the directories as a publication particularly issued. There is no allegation of any place of business to which customers resorted to purchase directories. Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think that there was any business of publishing a directory for 1885 carried on by the plaintiff, or anything that, for example, could have been sold as a going concern by an assignee in insolvency if he had become an insolvent debtor. The cases upon liability for wrongful interference with the business of another are largely collected in *Walker v. Cronin*, 107 Mass. 555; but in that case there was an actual business, with the carrying on of which the defendants wrongfully interfered.

The declaration in this case, indeed, alleges that the plaintiff made his preparation for compiling and publishing a directory for 1885, but it does not allege what these preparations were, or that they were anything valuable. The averment that he "has been put to great loss and expense in preparing for said compilation and publication," near the end of the declaration, appears to be a part of the damages. The plaintiff cites *Swan v. Tappan*, 5 Cush. 104, but there the declaration was held insufficient because there was no allegation of special damages. The declaration in the present case cannot well be distinguished, in this respect, from the declaration in *Swan v. Tappan*; but we do not deem it necessary to reconsider the decision in *Swan v. Tappan* on this point. In *Swan v. Tappan* the plaintiff was actually engaged in selling his book, which had already been printed and put upon the market, and the action was the ordinary action for the malicious disparagement of the goods of another, manufactured and kept for sale.

The plaintiff relies upon *Benton v. Pratt*, 2 Wend. 386, which, perhaps, may be considered as an extreme case. See *Randall v. Hazelton*, 12 Allen, 412-417. In *Benton v. Pratt*, Seagraves & Wilson, at Allentown, had orally agreed to purchase of the plaintiff 200 hogs at the market price, if delivered within three or four weeks, and they had not been supplied; and "about the time for the delivery" the plaintiff was proceeding with the drove of hogs to Allentown for the purpose of de-

livering to them 200 hogs. Pratt, the defendant, by his falsehood and deceit, intentionally prevented the performance of this contract, by persuading Seagraves & Wilson that the plaintiff was not intending to drive his hogs to Allentown, whereby they were induced to buy the hogs of the defendant instead of the hogs of the plaintiff, as they otherwise would have done. The court says that it was not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not; "but the agreement, if there was an agreement although not in writing, was an actual offer by Seagraves & Wilson, not revoked, and which they would have performed; and the plaintiff was in actual possession of the property which Seagraves & Wilson had offered to buy, and was actually proceeding to deliver this property to them in accordance with their offer."

The fatal objection of the present case is that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made fraudulent representations as alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts, but this, upon the principles stated in *Bradley v. Fuller*, *ubi supra*, and the cases therein cited, is not sufficient to support an action.

Judgment affirmed.

DAVIS v. NEW ENGLAND RY. PUB. CO.

(Supreme Judicial Court of Massachusetts, 1909. 203 Mass. 470, 89 N. E. 565, 25 L. R. A. [N. S.] 1024, 133 Am. St. Rep. 318.)

Suit by William L. Davis against the New England Railway Publishing Company and others. The cause was heard by a single justice on the demurrers of the respective defendants, and the cause was reported for the opinion of the full court.

KNOWLTON, C. J. The plaintiff is the proprietor of the Northern Express Company, which carries merchandise between Boston and many cities and towns in Massachusetts, Maine and New Hampshire. He also sublets portions of his office to the proprietors of other express companies doing business in or near Boston. The defendant corporation is the publisher of the "A. B. C. Pathfinder and Dial Express List." The bill contains the following averments: "The publication is the only one of its kind issued or in circulation in Boston. The publication is in a form intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses doing business in Boston and vicinity. It has created and does create such belief in the minds of the public. This belief is the main, if not the sole, reason inducing purchases of the publication by the public. This belief has enabled the corporation to obtain a large circulation among the business houses and general public in Boston and vicinity. The above publication is usually

and frequently consulted by persons having occasion to employ a local express. It has come to be accepted by the general public as the recognized directory of local express companies."

There are other averments showing some of the particulars of the contents of the publication, which tend to support the above general averments, and particularly the averment that it is intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses doing business in Boston and vicinity. A copy of the publication is made a part of the bill, and it tends to confirm and strengthen this averment. It is averred that "the plaintiff and each of his subtenants is conducting his express business in a lawful and proper manner, and to the convenience and satisfaction of his patrons"—in substance, that these express companies are reputable—and that: "no good reason exists why the defendant corporation should discriminate against them or any of them, or should exclude reference to them or any of them from its publication." It is averred that the defendant corporation has omitted any reference in its publication to the business of the plaintiff or of his subtenants, and that it is about to bring out another issue of the same general publication, and has been requested to include the plaintiff's office in the list of express offices, and to make reference to the express business of the plaintiff and his subtenants, and has refused and still refuses so to do. The plaintiff also alleges that the defendant corporation refuses to assign any reason for its objectionable conduct.

It is alleged that the other two defendants control a majority of the general local express companies whose names appear in the publication, that they have an acquired and dominating influence in this business in Boston, and are seeking to obtain an absolute monopoly of this kind of business, to the exclusion of the plaintiff. He avers that they have conspired together to prevent the publication by the defendant corporation of any reference to the business of the plaintiff and his subtenants, and by threats and false statements have induced the defendant corporation to leave the plaintiff and his business without mention in the publication.

The case comes before us on a demurrer, which, for the purposes of the hearing, admits the truth of all the averments of the bill.

The ground on which the plaintiff seeks relief is not that he has a right to compel the defendants or either of them to do anything for his benefit, but that he has a right to have them refrain from intentionally doing anything, without legal justification, to his injury. The defendant corporation professes to give the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. One purpose of the list is to show the public where they can go to get their express business done. Another purpose is to give the express companies

named in the list the benefit of having their names and the nature of their business brought before the public who have such business to be done. The direct effect of the false statement is to point those who want the services of an express company to other companies, and to divert them from the plaintiff. They are told, in substance, that there is no such person as the plaintiff, and no such company as the Northern Express Company, engaged in this kind of business. The averment of the plaintiff that he is greatly injured in this way is no more than a statement of the natural result of publishing a directory of express companies with his name and the name of his company left out of it. An intentional act of this kind, without excuse, is a violation of his legal rights. It is the publication of a falsehood concerning him, the direct and natural effect of which is to injure him in his business. The public is misled by the intentional publication of an incorrect list. But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong.

It is peculiarly a case for equitable relief. The wrong is a continuing, and in a sense an irreparable, one. The extent of the injury cannot be measured accurately in an attempt to assess damages.

The injury is to property, and it is not technically a libel upon the plaintiff. The rule that a court of equity will not enjoin the mere commission of a crime does not apply. The conduct complained of works a continuing and permanent injury to the plaintiff's property. Upon proof of the facts set out in the bill, the plaintiff will be entitled to an injunction to protect him from the wrongful publication.

The defendants Kelley and Sampson are alleged, not only to have participated in the wrong, but to have instigated it. It is said that, for their own interests, and to obtain a monopoly in certain departments of the express business, they made false statements about the plaintiff to the other defendant, and threatened injury to the other defendant's business, in order to induce the wrongful publication. Upon proof of these facts and the other averments of the bill, the plaintiff is entitled to an injunction against these defendants, to prevent them from attempting to procure this wrongful kind of publication in the future. He has a right to have the other defendant relieved from the temptation to continue the wrongful publication to which their misstatements and threats might subject it.

Their desire to advance their own interests, in competition, is not a justification for attempting to interfere with the plaintiff's business by misstatements, and the making of a false and misleading publication. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330;

Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499.

The bill is not multifarious in seeking relief against all of these defendants. In different ways they were all participating in the infliction of an injury on the plaintiff and his subtenants. To a degree, each was responsible for the commission of the wrongful act. Their relations to the matter complained of were such that it was proper to join them, so that the plaintiff might obtain relief at one time against all the persons engaged in the interference with his rights of property, in order to protect him, if possible, from a repetition of the wrong. It is proper, too, that the defendant corporation should have protection against a continuance of threats and false statements by the other two defendants.

Demurrer overruled.

Defendants to have leave to answer.

OLIPH. TRADE REG.—23

CHAPTER IV

APPROPRIATING COMPETITOR'S TRADE VALUES

SECTION 1.—THE DEMAND FOR HIS GOODS OR SERVICES

STONE v. CARLAN.

(Superior Court of New York, 1850. 13 Law Rep. 360.)

The important facts of this case appear in the opinion of the court.

CAMPBELL, J. A motion is made for an injunction, restraining the defendants from using the names "Irving Hotel," "Irving House," "Irving," &c., upon their coaches, and upon certain badges worn by defendants upon their arms and hats. The complainants have an agreement with the proprietors of the Irving House, in this city, under which they are permitted to use the name of such proprietors, and the name of their hotel, upon their coaches and the badges of their servants; the complainants paying therefor a stipulated sum, and having also entered into bonds for the faithful discharge of these duties. All the porters are engaged in carrying passengers and their baggage to and from the hotels, boats, railroad depots, &c.

It was well remarked by the Master of the Rolls, in *Croft v. Day*, 7 Bevan, 84, that "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud; and fraud may be practised against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." I entirely concur in the foregoing views. The question is, whether the defendants have committed a fraud. I cannot doubt that their intention was to mislead, and to induce travelers to believe that they were servants of the proprietors of the Irving House. This is a large and popular hotel, well known in the country, and many a traveller may wish to resort to it on his ar-

rival in this city, who, at the same time, may not know whether the carriages of the proprietors are painted red or white, or whether the exact designation is that of the Irving House or Irving Hotel. Such traveller may wish to intrust himself and his baggage to the servants of the hotel, feeling that, in doing so, he would be protected against loss or damage by the responsibility of the proprietors. Now, in this case, it can hardly be doubted that the object of the defendant was to induce the belief on the part of the travellers that they were the servants of this hotel. To induce such belief, it was not necessary that the resemblance of all carriages and badges should be complete. From the very circumstances of the case, it would not be necessary to have a perfect resemblance, in order to commit even a gross fraud. It is not necessary to go, in this case, the length of the ordinary cases of trade-marks, though this case might come within the rules of those cases. See *Coats v. Holbrook*, *Nelson & Co.*, 2 Sandford, Ch. R. 586, and notes, and cases there cited. The false pretences of the defendants would, I think, necessarily tend to mislead.

The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic and attentive. The employment is open to them, but "they must not dress themselves in colors, and adopt and bear symbols," which belong to others. I had some doubt, at the time of the argument, whether the complaint should not have been made by the proprietors of the Irving House; but, on further reflection, think that the suit is well brought. The plaintiffs are the real parties in interest. It is possible that, owing to the general liability of the proprietors, as innkeepers, for the loss of the property of guests, the proprietors might also be entitled to an injunction restraining the defendants from holding themselves out as the servants of the hotel.

An injunction must issue, as prayed for, against all the defendants.

SINGLETON v. BOLTON.

(Court of King's Bench, 1783. 3 Doug. 293.)

Thomas Singleton, the plaintiff's father, sold a medicine called "Dr. Johnson's Yellow Ointment." The plaintiff, after his father's death, continued to sell the medicine, marked in the same way. The defendant also sold the medicine, with the same mark, and for that injury the present action was brought. It was tried before Lord Mansfield, when the plaintiff was nonsuited. A rule having been obtained for a new trial.

LORD MANSFIELD said, that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and defendant

use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration.

Rule discharged.

BLOFELD v. PAYNE.

(Court of King's Bench, 1833. 4 Barn. & Ad. 410.)

Case. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman, C. J., at the sittings in London after last term, it appeared that the defendants had obtained some of the plaintiff's wrappers, and used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' hones were of inferior quality? but he stated to them that even if the defendants' hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' hones were not inferior to his. Leave was reserved to move to enter a nonsuit.

Barstow now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' hones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITTLEDALE, J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the

plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule.

TAUNTON, J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made this use of them, entitles the plaintiff to some damages.

PATTESON, J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN, C. J., concurred. Rule refused.

MILLINGTON v. FOX.

(High Court of Chancery, 1838. 3 Myl. & C. 338.)

The bill, which was filed on the 7th of August, 1834, stated that the plaintiffs, Crowley Millington and Thomas Isaac Millington, carried on, and had for many years, the business of manufacturing steel for sale, at Swalwell, Winlaton Mill, and Team, all in the county of Durham, * * * and at Greenwich, in Kent, and in Thames street, London; and that the plaintiffs' works at Swalwell were known as "the Crowley Works"; that the business carried on by the plaintiffs was originally founded at the end of the seventeenth century, or in the early part of the eighteenth century, by a person of the name of Crowley, who invented or introduced a particular mode of manufacturing steel, which has ever since been followed by the plaintiffs and those whom they succeeded in business; that some descriptions of steel so manufactured were known as Crowley's German or shear steel, and the same and other descriptions by the name of Crowley steel; that about the year 1782 the plaintiffs' grandfather, Isaiah Millington, became a partner in the business, and that it has ever since been carried on by him or his descendants, either alone or with partners; that, from the time at which he entered the business, the firm has been known by the name of Crowley, Millington & Co., and the steel manufactured by them has been known in the market by the name of Crowley steel, or Crowley Millington steel; that the steel manufactured by the plaintiffs and their predecessors has always been distinguished by certain marks upon the bars or pieces of steel so manufactured; that the principal of these marks was originally "Crowley," and afterwards "Crowley Millington," or one of those names; that the letters "I. H." were, upwards of fifty years ago, introduced into the marks stamped on double shear steel made by the plaintiffs' firm, being the initials of the name of John Heppel, their principal workman in that steel.

The bill went on to state that the defendants, James Fox and Samuel Fox, had, for more than six years before the filing of the bill, car-

ried on at Sheffield the business of manufacturers of steel, under the name of "Fox Brothers," or "Fox Brothers & Co.;" that they had manufactured considerable quantities of steel, which they had marked with the plaintiffs' before-mentioned marks; that they had so marked steel manufactured by them, in order that it might be sold in the market as steel manufactured by the plaintiffs, and, further, that other persons besides the defendants had marked steel with the plaintiffs' marks; and that the defendants had bought the steel so marked and sold it again. The bill charged that the defendants were still in the habit of selling, or sending for exportation, great quantities of steel stamped with the plaintiffs' marks.

The prayer of the bill was that the defendants might account for the profits made by them by the sale of steel stamped with the plaintiffs' before-mentioned names or marks, and might deliver up to be destroyed all steel not manufactured by the plaintiffs, but stamped with their names or marks, and all instruments used in making such marks, and that the defendants might be restrained from stamping steel with the before-mentioned names or marks, and from manufacturing or selling steel so stamped.

The answer of Samuel Fox stated that, in June, 1834, before the bill was filed, James Fox went to America, and had not since returned, and that about four or five months before the date of his (the present defendant's) answer, he was, for the first time, informed that the plaintiffs carried on the business of manufacturing steel under the firm of "Crowley, Millington & Co.," such information having been obtained by the defendant by means of an advertisement in the Sheffield newspapers, stating that an injunction had been obtained by Crowley, Millington & Co. against Messrs. Greaves, to restrain the use of the names or words "Crowley Millington" on steel manufactured by Messrs. Greaves, and that ever since the defendant had known anything of the manufacture of steel, the term "Crowley" had been applied to steel manufactured from the bar, and made up in bundles of one hundred weight each called faggots; the term "Crowley" having been, for twenty years and upwards, and so long as the defendant had known the steel trade, been considered synonymous with the term "faggot," and not as designating the manufacture of any particular persons; that until the advertisement appeared, the defendant was not aware that the terms "Crowley" and "Crowley Millington" were any other than marks designating particular kinds of steel, such marks having been used generally, if not universally, in the steel trade for very many years; that the defendant always understood * * * that the marks or names were in no one instance supposed to designate a maker's name, but merely the quality or kind of article; that the defendant never knew or believed, or was informed, that the letters "I. H." had any other signification than as being one of the ordinary marks used among steel manufacturers

throughout the kingdom for a long course of years; and that he never knew or heard of such a person as John Heppel.

The defendant also stated that he believed he had never used the marks mentioned in the bill, without the words "Fox Brothers" also, and denied that steel so marked as in the bill mentioned was, by reason of such marks, considered in the market to be manufactured by the plaintiffs' firm; that until about the month of July, 1834, he never even heard that there was any such firm in the trade as Crowley, Millington & Co.: that he had been informed and believed that the marks in question were in general use in Sheffield and its neighbourhood, until the injunction was obtained against Messrs. Greaves; and that, since hearing of the injunction obtained against Messrs. Greaves & Co., the defendant and his partner had entirely abstained from selling any steel marked with the marks in question, or any of them.¹

THE LORD CHANCELLOR [COTTENHAM]. The sole object I had in looking into the pleadings in this cause was to satisfy myself as to what ought to be done with respect to the question of costs; having previously come to the conclusion that there was sufficient in the case to shew that the plaintiffs had a title to the marks in question, and they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time, the case is very different from the cases of this kind which usually occur, where there has been a fraudulent use, by one person, of the trade marks or names used by another trader.

I see no reason to believe that there has, in this case, been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to shew that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to shew that the terms "Crowley" and "Crowley Millington" were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and, therefore, I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual.²

¹ The pleadings are abridged and the statement of the evidence is omitted.

² The remainder of the opinion, which relates to costs, is omitted.

CRAWSHAY v. THOMPSON.

(Court of Common Pleas, 1842. 4 Man. & G. 357.)

Case. The declaration stated that the plaintiff was an iron manufacturer and exporter of iron, and the plaintiff did make and sell large quantities of bars of iron, of a superior quality, which the plaintiff was accustomed to mark with a certain stamp, consisting of the letters W. C., enclosed within a certain oval figure, in order to distinguish them from all bars of iron prepared by other persons. And the plaintiff had sold, and still did sell, large quantities of such bars so marked. And whereas the plaintiff had gained great fame with the public, and also with foreign merchants at Constantinople and Smyrna in Turkey, on account of the excellent quality of the bars by him prepared, marked, and sold, whereby the demand for the said bars was very great, and the plaintiff had acquired and was acquiring great profits by the sale of his bars of iron so made and marked; yet the defendants, well knowing the premises, but wrongfully, knowingly and fraudulently, and against the will and without the consent of the plaintiff, manufacture 200,000 bars of iron, of similar form to those of the plaintiff, and did wrongfully, knowingly and fraudulently, and without the consent of the plaintiff, stamp the said bars in imitation of the plaintiff's stamp, to wit, consisting of the letters W. O., enclosed within a certain oval figure, and which mark the defendants then well knew and intended to be in imitation of the mark so used by the plaintiff and was by the defendants so used, in order to denote that such bars were of the genuine manufacture of the plaintiff; and the defendants did knowingly, wrongfully, and fraudulently, and against the will of the plaintiff, and without his license, sell for their own gain the bars by them manufactured, as and for and under the false colour and pretence that the same were bars of iron of the genuine manufacture of the plaintiff; whereas, in fact, the plaintiff had never manufactured the said bars, or any of them. By means of which the plaintiff was wrongfully prevented by the defendants from selling 200,000 bars by him manufactured, and was deprived of profits, which would otherwise have accrued to him from the sale thereof. And also by means of the premises, divers persons in Turkey aforesaid, had been induced to buy, and had bought, large quantities of the bars so made and sold by the defendants, as the genuine manufacture of the plaintiff, and also had been and were induced to believe that the bars so made and sold by the defendants were bars made and sold by the plaintiff. And because the bars so made and sold by the defendants were of inferior quality to those made by the plaintiff, the reputation of the plaintiff with the public was greatly prejudiced to the damage of the plaintiff of £30,000., &c.

Plea: Not guilty.

At the trial before Tindal, C. J., the jury returned a verdict for the defendants.

Shee, Serjt., in last Hilary term, obtained a rule nisi for a new trial on the ground of misdirection.³

COLTMAN, J. I am of opinion that there has been no misdirection in this case. The declaration alleges in substance that the defendants made certain bars of iron bearing a mark in imitation of that used by the plaintiff, and that they sold those bars, with the intention that they should pass in the market as bearing the plaintiff's mark. That allegation gives rise to the questions left by my Lord to the jury. First, whether there was such a resemblance of the plaintiff's mark as was calculated to impose on any ordinary person; and secondly, if there was, whether the mark was used by the defendants with the intention to deceive. It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party, that the iron should pass as the iron of the plaintiff. If there was such a similarity as might impose on ordinary persons, and it was shewn that the defendants were aware of the resemblance, and that it was calculated to mislead, the plaintiff would have been entitled to the verdict, for the intention to deceive would have been manifest. Evidence was offered to the jury in support of the allegation which the plaintiff had to make out; but it appears to me that there was nothing in that evidence to shew the jury that the defendants had such a knowledge as alleged, or that the mark used by the defendants was so calculated to deceive as stated by the plaintiff.

There was a good deal of evidence to shew that persons might possibly be imposed upon by the mark used by the defendants; but there was none to shew that the defendants really believed that such would be the consequence of their using the mark in question. The plaintiff, indeed, told the defendants that such was the effect of their using the mark; but it does not appear that the defendants gave credence to the plaintiff's statements upon this point. On the contrary, the defendant Thompson represented—and we have no reason, contrary to the finding of the jury, for saying it was not so,—that the mark they used would pass for a Russian mark in the Turkish market. I think, therefore, that the two points were properly left to the jury by the Lord Chief Justice. * * *

Upon the whole, I think the rule for a new trial should be discharged.

MAULE, J. I also think this rule should be discharged. The first question is, whether there has been any misdirection. Now, I agree with what has been said at the bar, that, in order to see whether or not there has been a misdirection, we must look at the pleadings and to the course of the evidence at the trial. The declaration alleges that the defendants fraudulently sold certain bars of iron "as and for, and

³ The statement of facts has been abridged and a part of each opinion omitted.

under the false colour and pretence that the same were, respectively, bars of iron of the genuine manufacture of the plaintiff." I rather think that the gist of the action is the selling iron of the defendants' manufacture as and for iron of the plaintiff's manufacture; and that this allegation would have been sustained if it had been shewn that the defendants had sold their iron to their correspondents for the purpose of being retailed, as of the plaintiff's manufacture. But there is a preceding allegation in the declaration, that the plaintiff having used a certain mark in the manufacture of his iron, the defendants knowingly manufactured their iron with a mark, in imitation of that used by the plaintiff, in order to denote that such iron was manufactured by the plaintiff. Now, I think the declaration might have been good without that allegation; and if that be so, then the question arises, whether, that allegation having been inserted in the declaration, it would be necessary to prove it; and I think such proof would be necessary; for it is an allegation of a particular mode of effecting the wrong complained of, and ought therefore to be proved as alleged. In an action on the case for diverting a watercourse, the plaintiff may declare generally; but if he state a particular mode of diversion, he is not at liberty to prove any other.

The first question that was left by my Lord Chief Justice was, in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff's; and I think that this was a material question, for the reasons just stated; and that from the course of the evidence, that question would have been properly raised, even if the allegation as to the particular mode of imitation had not been contained in the declaration. The plaintiff's case is, that the defendants made iron and marked it in such a manner, that it might be taken as the plaintiff's iron, and in that way represented it as the manufacture of the plaintiff; and this is, in effect, the same as an allegation that particular words had been used to convey such representation. The question whether the defendants sold their iron as the plaintiff's depends upon whether the mark itself represented that the iron was manufactured by the plaintiff. The question for the jury was, whether such a representation was in fact made. It was left to them to say, whether the mark was used by the defendants with an intention to deceive. And that was a proper question to leave to them; for if the mark was not so used, there was no such representation on the part of the defendants as is alleged in the declaration, and consequently the declaration was not proved. * * *

Several cases were cited for the purpose of shewing that it was not necessary to prove that the defendants intended to pass off their iron as the plaintiff's; but that, whatever may have been their motive in so doing, if they executed the orders of correspondents, knowing that by so executing them, their goods would be calculated to pass as the plaintiff's, the substantial part of the declaration was proved, and the defendants would be liable. The argument in effect amounts to this:

If the defendants sold their iron as and for the plaintiff's, they are liable, whatever may have been their motive for so doing. And I agree that this may be so. But I think that the Lord Chief Justice did, in effect and substance, so direct the jury; for he told them to find for the plaintiff, if they considered that the defendants had sold their iron, as and for the plaintiff's. If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure; that is the effect of *Polhill v. Walter*, 3 B. & Ad. 114. The matter complained of in that case was, that the defendant had knowingly made a false representation as to his authority to accept a bill of exchange for another party; and that fact having been proved, and it also having been proved that the plaintiff had sustained an injury by reason of such false representation, the action was held to lie. So, in this case, if it had been proved that the defendants had, by any means, falsely and knowingly represented their iron as of the plaintiff's manufacture, the plaintiff would have been entitled to the verdict; but that in effect, was the question that was left to the jury. So, in *Foster v. Charles*, 6 Bing. 396, 7 Bing. 105, 4 Moo. & P. 61, 741, the wrong complained of was, that a false representation had been knowingly made by the defendant as to the circumstances of a third party, whereby the plaintiff was induced to employ such party, and that an injury had resulted to the plaintiff therefrom; and these facts being proved, it was held that the action was maintainable without reference to the defendant's motives in making the statement. So here, the complaint is, that a false representation has been made by the defendants, whereby the plaintiff has suffered an injury; and the action will lie if that representation was made knowingly by the defendants; and that was the question left by my Lord to the jury. * * *

It is argued that, supposing the defendants marked their iron in a way calculated to deceive other parties, although they had no intention of doing so, yet if they were told that such was the effect of using the mark, and they still continued to do so, they are liable to an action. But I cannot quite accede to that position. If a party is merely told that by continuing to do a certain thing he may deceive others, and he continues to do the thing without any intention to produce that effect, I do not think that an action will lie against him—at any rate, certainly not in this form of declaration. The effect of the decision in *Millington v. Fox*, 3 Myl. & Cr. 338, is, that the Lord Chancellor thought the defendants would have been in the wrong if they had continued to use the plaintiff's marks after they had received notice from the plaintiffs. But why was this? because it was clearly shewn, and was indeed admitted by the defendants, that the use of his mark would have been an injury to the plaintiffs; and therefore, if, after the notice, they had continued to use the mark, they must have known of the injury they were doing to the plaintiffs. But here the question is, whether the notice to the defendants was improperly

excluded from the consideration of the jury; and it is contended that the first question left by my Lord should have been the only one submitted to the jury. But it appears to me that the second question was properly left both upon the letters and upon the rest of the evidence. Nothing was withdrawn from the jury. If his Lordship had been desired to read the letters to the jury, he would probably have done so; though I do not think he would have been bound to do so, provided they were not withdrawn from the jury.

4 CRESSWELL, J. I quite concur in the opinion that this rule should be discharged. As to the question with regard to misdirection, it appears that two questions were left by my Lord to the jury. The first was, whether there was such a close resemblance in the mark used by the defendants to that of the plaintiff as to be calculated to impose on the unwary, and injure the plaintiff's sale. Now it may be said that this perhaps was not a necessary ingredient in the proof to be given by the plaintiff. But it is to be observed, however, that there is a distinct allegation in the declaration, that the defendants "did wrongfully, knowingly and fraudulently stamp or mark the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape and appearance of the plaintiff's said stamp or mark, and which mark the defendants then well knew and intended to be in imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid, and was by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the said plaintiff, and were respectively bars of iron prepared, manufactured and made by the said plaintiff." Now, admitting that it was not necessary to prove the first allegation, still I think the direction to the jury was perfectly right; for there was nothing to support the declaration, and establish any representation by the defendants as to the iron being of the plaintiff's manufacture, but the evidence as to the similarity of the mark.

The other question left was, whether there had been any fraudulent intention on the part of the defendants to deceive customers by using this mark, or whether it was used innocently by the defendants in the course of the execution of orders without any intention to deceive; and I think it clear that the latter expression must have been understood as meaning without any fraudulent intention on the part of the defendants. This is in the nature of an action for deceit; and it is laid down in *Com. Dig. tit. Action upon the Case for Deceit, F, 3*, that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he deceived; and that he did it *falso et fraudulenter*." There is an early case in illustration of this principle, cited by Doderidge, J., in *Southern v. How*, *Poph. 143*, to

this effect, as stated in Popham (page 144): "An action upon the case was brought in the Common Pleas by a clothier—that, whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance, to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his cloth; and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie." The same case is cited also in Cro. Jac. at page 471; but it is there said that the action was brought by him who bought the cloth; whereas in Popham, the action is said to have been brought by the manufacturer, and the gist of the action appears to have been the use of his mark "on purpose to deceive."

In *Polhill v. Walter*, 3 B. & Ad. 114, and that class of cases no intention to deceive was proved; but there we find falsehood in fact, with knowledge on the part of the defendant. Now what falsehood in fact is there in this case? Did the defendants falsely represent their iron to be of the plaintiff's manufacture? That is the very question in the cause; and that was left to the jury. Lord Tenterden, in giving the judgment of the court in *Polhill v. Walter*, observed: "If the defendant had had good reason to believe his representation to be true—as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery—he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive." The cases may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another.

Can it be contended that the mere use of a similar mark will give a right of action? I do not know that a man can have an abstract right to use any particular mark; but long user in a trade of a mark may produce a general impression that goods bearing such mark are of a particular manufacture. The notice here—although it was argued that it ought to have determined the case in favour of the plaintiff—cannot alter the legal rights of the parties. *Millington v. Fox*, which was relied upon, does not establish that doctrine. What is the notice here? It is to the effect that the defendants were using a mark similar to that used by the plaintiff. But such a notice is not equivalent to knowledge; as the defendants might dispute the resemblance; or they might admit the resemblance, and yet insist that they had no intention of passing off their goods as the plaintiff's. * * *

TINDAL, C. J., concurred.

Rule discharged.⁴

⁴ See also *Derry v. Peake*, 14 A. C. 366 (1889).

"Prior to the Judicature Act, 1873, there was a difference between the common-law courts and the equity courts with respect to actions to enforce the right to trade-marks. This is well pointed out in *Singer Manufacturing*

HOLMES, BOOTH & HAYDENS v. HOLMES, BOOTH &
ATWOOD MFG. CO.

(Supreme Court of Errors of Connecticut, 1870. 37 Conn. 278, 9 Am. Rep. 324.)

CARPENTER, J.⁵ In 1853 the plaintiff corporation [Holmes, Booth & Haydens] was organized under the joint-stock laws of this state, taking the name of four of its principal corporators or promoters. Two of these, Israel Holmes and John C. Booth, whose names appear in the corporate title, by long experience had acquired considerable skill and reputation in the manufacture of brass, the business for which the corporation was organized. Thus organized, the corporation established and carried on a successful business, and their corporate name acquired a valuable reputation in the public markets of the country. There were but five original stockholders. The amount of the capital stock, and the number of shares owned by each, do not appear; but at the time of the organization of the defendant corporation, February 9th, 1869, the stock consisted of sixteen thousand shares, distributed among fifty-one stockholders. Six of the eight corporators in the new corporation were stockholders in the old, and four of them were directors, one of whom was president until a short time before. The respondents organized under the corporate title of "the Holmes, Booth & Atwood Manufacturing Company," for the purpose of carrying on, and carried on, the same business as that done by the petitioners.

Their place of business was in the same town, and their depots in New York and Boston were in the same streets. The similarity of the names of the two companies resulted in confusion of their cor-

Co. v. Wilson (1876) 2 Ch. D. 434, 454, by Mellish, L. J., who says: 'To give a right of action at common law, the thing must have been done fraudulently. it must have been intended to deceive. But the courts of equity said: If you have purchased goods with another man's trade-mark upon them, although you may have done it perfectly honestly, not knowing that it was another man's trade-mark, or if you have manufactured goods for somebody else, who has ordered you to manufacture them with a certain trade-mark upon them, and you have manufactured the goods with that trade-mark upon them, perfectly honestly, and not knowing that you were doing anything wrong in putting that trade-mark upon them, yet, nevertheless, you cannot be allowed to put the goods into the market with that trade-mark upon them, because the effect of it will be that the goods will pass from hand to hand as being goods manufactured by the person whose trade-mark it is; and therefore you shall be restrained from doing that.' That case was appealed to the House of Lords (1877) 3 App. Cas. 376, and the decision of the Court of Appeal was reversed; but Lord Cairns says, with reference to the point now under consideration, 3 App. Cas. at page 391: 'That there have been many cases in which a trade-mark has been used, not merely improperly, but fraudulently, and that this fraudulent use has often been adverted to and made the ground of decision, I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark.'

Per Vaughn Williams, L. J., in *Bow v. Hart*, [1905] 1 K. B. 592, 600.

⁵ The statement of facts is omitted.

respondence, mistakes in the delivery of orders, goods, &c., and it is expressly found that, "by reason of this similarity, dealers in the market are likely to be confused and misled into the belief that the companies are the same." Other facts of less importance appear, but the above embraces all the material facts in the case.

Upon these facts the petitioners pray that the respondents may be restrained from the use of their corporate name, also from using the words "Holmes, Booth," or the words "Holmes" or "Booth," in the name, title, or style of the corporation, or any words or titles so expressed as to be in any degree an imitation of the corporate name of the petitioners.

The petitioners insist that if the respondents are permitted to continue their business as heretofore, their goods will be sold in market as the goods of the petitioners. This claim is not seriously controverted, and we think it is a fair inference from the facts found. That any name, symbol or device, adopted by an individual, corporation or business firm, for the purpose of designating the origin and ownership of goods manufactured by them, will be protected as a trade-mark is well settled law. The name of a corporation or partnership, accomplishing the same object, will be protected upon the same principle. This is not disputed. Indeed the respondents seem to admit that the petitioners are entitled to the relief sought, unless they can protect themselves in the use of their corporate name on [the ground that] there is no actual fraud found, and no purpose or intention on the part of the respondents to use their name to the prejudice of the petitioners.⁶

It is said that the finding in this case failed to substantiate the allegation of fraud in the petition, and an intent on the part of the respondents, by stimulating the petitioners' name, to draw away their customers. There are cases which seem to establish the proposition that neither fraud nor an actual intention to do the injury complained of is essential to the petitioners' case. *Millington v. Fox*, 3 Mylne & Craig, 338; *Cartier v. Carlisle*, 31 Beavan, 203; *Davis v. Kendall*, 2 R. I. 566.

The ground on which courts of equity afford relief in this class of cases, is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial enquiry.

Perhaps, however, it is inexpedient to declare the broad proposition deducible from those cases as the law of this state. Every man, acting intelligently, will be presumed to intend the necessary consequences of his acts. *Charton v. Douglass*, 23 Jurist, 887; s. c., *Johnson's Rep.* (Eng.) 174; s. c., 22 Law Reporter, 172. The same presumption applies, with less force perhaps, to the probable and ordinary conse-

⁶ So much of the case as relates to other grounds specified is omitted.

quences. The application of this rule to the present case can do no injustice. Most of the respondents' corporators were officers, stockholders and employees of the plaintiff corporation. One after another resigned his office or position, and sold out his stock, and secretly organized and put in operation a rival company, which bought the entire property of a similar corporation in a neighboring town, and located themselves permanently in the same town with the petitioners, established their depots for the sale of their goods in New York and Boston as near as practicable to the depots of the petitioners, and assumed a name so nearly like that of the petitioners as to induce the belief that the two companies were the same. From these facts the intention to benefit themselves at the expense of injuring the petitioners, so far as such intention is essential, may be legitimately inferred.

For these reasons we advise the superior court to grant the prayer of the petitioners.

LAWRENCE MFG. CO. v. TENNESSEE MFG. CO.

(Supreme Court of the United States, 1891. 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.)

In its bill for an injunction and an accounting of profits, the plaintiff, a Massachusetts corporation producing and selling sheeting, claimed to have adopted in 1870 the sign "LL" as a trade-mark, and to have printed it upon each piece of sheeting of a certain weight produced for more than fifteen years. The bill claimed the exclusive right to use this trade-mark from January 1, 1884. It set out that, from that date to the date of the bill, the defendant, a Tennessee corporation had stamped its sheeting with the sign "LL" for the purpose of taking advantage of the plaintiff's trade reputation. It was alleged that the acts of the defendant tended to deceive the public and constituted a wrongful appropriation of the plaintiff's trade-mark and good will. In its answer, the defendant claimed that the sign "LL" was used by the plaintiff and the trade generally to denote goods of a certain weight and that both parties accompanied the sign "LL" with other words and symbols to designate the manufacturer of the goods in question.⁷

Replication having been filed, the cause came on for hearing April 28, 1887, before Judge Jackson, upon the pleadings and voluminous depositions taken by the respective parties, and resulted in a decree dismissing the bill. The opinion of the Circuit Court will be found in 31 Fed. 776. In a painstaking review of the evidence the Circuit Court stated the facts to be:

That, prior to 1867, plaintiff branded its 4-yard sheetings with a picture of a bull in a rampant position in connection with the words "Lawrence Mills," and the single capital letter "L"; that in 1867, plaintiff added another capital letter "L," at which time plaintiff was

⁷ This summary has been substituted for the bill and answer.

a well-known manufacturing company, and had manufactured and sold large quantities of 4-yard goods; that in 1883 plaintiff substituted for the bull rampant the bull's head; that since 1867 plaintiff had put upon the market, continuously, a sheeting of the same weight as its third-class goods of first quality, but inferior to, and of less value than the former, which it branded "Shawmut LL Sheetings," and that it made two other kinds of brown sheetings graded according to weight, one of which is stamped "XX" and the other "XXX," to denote distinction in grade; that plaintiff had for many years advertised its sheetings in a well-known dry goods advertising periodical, heading its advertisement with the picture of a bull's head, the words "Lawrence Mills" and the letters "XX," "XXX," and "LL;" that plaintiff made flannels and denims on which it used the picture of a bull's head and the words "Lawrence Mills," as on the 4-yard sheetings, but not the letters "LL;" that letters of the alphabet have for many years been employed by manufacturers to designate grades and qualities of goods, and almost the entire alphabet is so used, and it is understood generally, in the cotton goods trade, that letters are thus used to designate grade, class, or quality; that it was also generally understood in the trade that "LL," as stamped on plaintiff's sheetings, meant 4-yard goods, and that the words "Lawrence Mills," in connection with the bull's head, were used to indicate the maker; that these goods were always invoiced by plaintiff as "Lawrence" or "Lawrence Mills" LL, and were thus generally known in the trade, except that in some instances persons who have been more familiar with them, or have handled them exclusively, called them simply "LL's," thereby meaning the sheetings made by the Lawrence company, but usually said sheetings were described as "Lawrence LL" or "Lawrence Mills LL," just as other sheetings stamped with "LL" were generally known in the trade and spoken of as "Beaver Dam LL," "Badger State LL," "Aurora LL," "Cumberland LL," etc.; that the signification of the letters "LL" stamped upon cotton sheeting, as indicative of grade, class, and quality, was generally understood in the trade when defendant commenced the use of said letters in 1885; that the Atlantic Mills of Lawrence, Mass., stamped the letters "LL" upon brown sheetings of its manufacture in the years 1860, 1862, 1864, and 1865, and from 1872 down to the present time; that there were cessations in the manufacture of said goods by the Atlantic Mills from time to time between 1860 and 1865, and between 1865 and 1872 none were thus stamped; that the weight of the Atlantic goods made in 1860, and stamped with the letters "LL," was 4.19 yards to the pound; that in 1862 the goods so stamped weighed 4.36 yards to the pound, and in 1863, 1864, and 1865 their weight was 4.56 yards to the pound; that in 1872, when the Atlantic Mills had again commenced placing the "LL" on its sheetings, they weighed, and ever since have weighed, 5 yards to the pound; that the Atlantic Mills, in 1860, made a grade of brown sheetings that weighed 3.89 yards to

the pound, and which it stamped with the single "L;" that the Atlantic Mills employed said letters to distinguish between different grades of goods, and has continued to use letters for that purpose; that it is fairly deducible from the evidence that the Atlantic "LL" cotton sheetings were in the market in 1867; that the Atlantic goods were and are of the same general character and class as those upon which plaintiff stamps "LL," and they are so nearly alike to the "Lawrence LL" that ordinary buyers, and even experts, cannot, by looking at them, distinguish them from each other; that they are both used for the same general purpose, and compete with each other; that, looking only at the letters "LL," purchasers would as readily mistake "Shawmut LL" for "Lawrence LL" sheetings as they would "Cumberland LL" sheetings; that John V. Farwell & Co. have for several years been using a private brand for sheetings known in the trade as "Albany LL," and in 1884, and with full knowledge of this fact, plaintiffs stamped for Farwell & Co. 4-yard sheetings with the label "Albany LL," the stamp being furnished by Farwell & Co., and returned to them with the goods, which were sold in the market as John V. Farwell & Co.'s "Albany LL sheetings"; that plaintiff had all the while known of the Atlantic Mills using the "LL" on its goods, and for more than six years before the commencement of this suit had been aware of the fact that numerous other manufacturers had been stamping said letters on their 4-yard cotton sheetings, and that it never objected until about the time of the bringing of this suit and one of a like character against the Aurora Cotton Mills at Chicago; that it did not appear that the brand of defendant had ever been mistaken for that of the plaintiff; that it was not shown that plaintiff, when it commenced using the letters "LL" on its third-class goods, adopted them for the purpose of making them its trade-mark or any substantial or material part thereof, nor that the single L, used prior to 1867, constituted in whole or in part its trade-mark; that the Atlantic Mills were using the single L, on one grade or class of goods merely to indicate quality, from 1862 up to 1868; that under the proof it was clear that the purpose and design of the change from L to LL was not to indicate origin or ownership, or to distinguish the sheetings on which said letters were stamped from similar goods manufactured by others, but that its primary object was to denote its class, quality, or grade, and to represent it to the public as being different goods, in class and quality, from those primarily sold by plaintiff under the single L stamp.

The Circuit Court quoted from the evidence of plaintiff's agent that the LL was adopted "because it was a time when cotton goods were depreciating. We had made considerable sales of the single L; but a party who had bought a large lot was underselling us at a price lower than we could afford to meet, and I suggested that, in order to keep them out of this competition, the mills should change the fold of the single L from a narrow to a wide fold, and put on a double L." The

court held that the letters were not only originally used by plaintiff to indicate the grade of the sheetings on which they were stamped, but to convey the impression that they were different goods from those it had previously sold, and that they could not constitute a valid trade-mark, such as would give plaintiff the exclusive right to use them on third-class sheetings, weighing one-quarter of a pound to the yard; that it might well be doubted whether letters by themselves or in combination could be employed to represent both the grade and quality of goods and their origin, thus performing at the same time the double office of a trade-mark and a description or classification of the article to which they were affixed, and be sustained as affording an exclusive right to the use of the device as a trade-mark, which would come into collision with the right of the public to use the letters in their other meaning. But that question was left undetermined, since the court concluded that the letters only indicated grade, class, or quality, and not origin, ownership, or manufacture. The court also held that the Atlantic company so used the letters before their adoption by plaintiff as to preclude the latter from acquiring a valid trade-mark therein; and that the putting upon the market of an inferior quality of cotton sheeting weighing four yards to the pound, and branded "Shawmut LL," equally warranted the use of the letters by the defendant, and prevented plaintiff from claiming injury to its trade by such use. The court found further that the plaintiff was not entitled to relief on ground that its label, or a distinctive part thereof, was being simulated by defendant so as to impose its goods upon the public as those of the plaintiff, since defendant had been guilty of no fraudulent intent, and had in no way either deceived the public or defrauded the plaintiff.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

After a careful examination of the evidence in this record, we are satisfied that the conclusions of the Circuit Court upon the facts are substantially correct. While there may be a conflict in some particulars, we regard the defendant's contention upon all points material to the disposition of the case as clearly sustained by the weight of the evidence, which we do not feel called upon to recapitulate. In *Canal Co. v. Clark*, 13 Wall. 311, 322, it was said by Mr. Justice STRONG, speaking for the court, that "the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article. But though it is not necessary that the word adopted as a trade-name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that

it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief.

This is the doctrine of all the authorities. Hence the trade-mark must, either by itself, or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired and understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is, in effect, representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.

"As was said in the well-considered case of *Manufacturing Co. v. Spear*, 2 Sandf. 599, 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.'"

We quote thus at length, because the decision is a leading one, which has been repeatedly referred to and approved as presenting the philosophy of the law applicable to trade-marks in a clear and satisfactory manner, as should also, indeed, be said of Judge Duer's noted opinion in the case therein cited. *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Goodyear's Rubber Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166; *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312.

Nothing is better settled than that an exclusive right to the use of words, letters, or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired; and while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality is not, of itself, sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style, or quality, it cannot be upheld as technically a trade-mark. *Manufacturing Co. v. Trainer*, *supra*, which involved the use of the letters "A. C. A." in connection with a general device, constituting a trade-mark, is very much in point, and the discussion by Mr. Justice Field, who delivered the opinion of the court, leaves little, if anything, to be added here. In that case, as in this, there was some evidence tending to show that it was understood that the letters were used to indicate origin as well as quality, but it was considered to be entirely overborne by the disclosure of the name of the manufacturer in full and the history of the adoption of the letters to designate quality only, as narrated by complainant.

We held, in *Menendez v. Holt*, 128 U. S. 514, 520, 9 Sup. Ct. 143, that the words "La Favorita" were so used as to indicate the origin of a special selection and classification of certain flour, requiring skill, judgment, and expert knowledge, and which gave value and reputation to the flour. The name was purely arbitrary—a fancy name, and in a foreign language—and did not in itself indicate quality. The legality of the trade-mark as such (and it had been duly registered under the act of Congress) was conceded by the answer, though it was contended in the argument that it was not valid, because indicative only of quality; but we were of opinion that the primary object of its adoption was to symbolize the exercise of the judgment, skill, and particular knowledge of the firm which adopted and used it, and that the phrase covered the wish to buy and the power to sell from that origin.

Since we are satisfied from the evidence that plaintiff failed to establish the existence of a trade-mark in the letters "L.L.," or that they constituted a material element in its trade-mark, relief cannot be accorded upon the ground of an infringement by defendant of an exclusive right in the plaintiff to use the letters as against all the world. The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69. If the absolute right belonged to plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred, and, if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143.

It seems, however, to be contended that plaintiff was entitled at least

to an injunction, upon the principles applicable to cases analogous to trade-marks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conduct with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief. In *Nail Co. v. Bennett*, 43 Fed. 800, where the bill alleged that the defendants had imitated plaintiff's method of bronzing horse-shoe nails, which plaintiff used as a trade-mark, with the intention of deceiving the public into buying their goods instead of plaintiff's, and the question came up on demurrer, Mr. Justice Bradley, after stating certain averments of the bill, said orally: "There is here a substantial fact stated, that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendant's nails for the complainant's. That averment is amplified in paragraph four of the bill. Now, a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainant, which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainant's peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge which we think the defendants should be required to answer." And see *New York & R. Cement Co. v. Coplay Cement Co.*, 44 Fed. 277.

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the plaintiffs had manufactured starch at Glenfield, which had become known as "Glenfield Starch." They removed from Glenfield, but continued to call their starch by the same name. The defendant, though his place of business was at Paisley, commenced manufacturing starch at Glenfield, and selling the same in Scotland with the words "Glenfield Starch" printed on the sale labels. This was interdicted by the court of session, but he continued to sell in England under a label of which "Glenfield" in larger or darker letters than any other on the packets was the pronounced feature, and the house of lords held that he was putting the word "Glenfield" on his labels fraudulently, and with the intention of making out that his starch was the starch of the plaintiff, who had by user acquired the right to the name of "Glenfield Starch," and enjoined him from so doing.

In *Thompson v. Montgomery*, 41 Ch. Div. 35, 50, the plaintiffs and their predecessors had for a hundred years carried on a brewery at

Stone, and their ale had become known as "Stone Ale." They had registered several trade-marks, which contained the words "Stone Ale" in combination with some device or name of their firm, and in 1888 they registered as an additional trade-mark the words "Stone Ale" alone. The defendant built a brewery at Stone, over which he placed the words "Montgomery's Stone Brewery," with a device containing the words "Stone Ale," and a monogram somewhat resembling the plaintiffs' trade-mark. It was held that the plaintiffs could not register "Stone Ale" as a trade-mark under the act of Parliament in that behalf, but that they had acquired by user the right to the use of the words "Stone Ale"; and that, the conduct of the defendant being, in the opinion of the court, calculated to deceive the public into supposing that his ales were brewed by plaintiffs, they were entitled to an injunction. Lord Justice Lindley remarked that, although the plaintiffs had no exclusive right to the use of the words "Stone Ale" alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, yet, "as against a particular defendant who is fraudulently using, or going to fraudulently use, the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders. In regard to that proposition, it appears to me that the Glenfield starch case has an extremely important bearing upon this case. The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone Ale' will be intended by him to be passed off as the plaintiffs' ale. I am satisfied that he does not use the words 'Stone Ale' for any honest purpose whatever, but, according to the evidence, with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention, by restraining him from using the words which he will only use for that purpose? In my opinion the Glenfield starch case warrants us in going that length as against this particular defendant."

But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances. If, in this case, the letters "LL" formed an important part of plaintiff's label, and the defendant had used them in such a way and under such circumstances as to amount to a false representation, which enabled it to sell and it did sell its goods as those of the plaintiff, and this without plaintiff's consent or acquiescence, then plaintiff might obtain relief within the principle of the cases just cited. But there is no such state of facts here. The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or of deception practiced on the plaintiff or on the public.

The decree is therefore affirmed.

LAMONT, CORLISS & CO. v. HERSHEY.

(Circuit Court of the United States, 1905. 140 Fed. 763.)

In Equity. Suit for unfair competition. On motion for preliminary injunction.

ARCHBALD, District Judge. To make out a case of unfair or fraudulent competition—an effort, in other words, to steal the trade built up by another—there must be an actual wrongful intent to deceive the public into the belief that the goods of the one party are the goods of the other, accompanied by such acts and devices as are likely to do so, or such duplication in form and dress of the one by the other as will produce a confusion calculated to bring this about, of which the party complained against is convicted of being willing to have the benefit. *Elgin Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; *Reddaway v. Banham* (1896) App. Cases 199; *Draper v. Skerrett (C. C.)* 116 Fed. 206; *Stevens Linen Works v. Don (C. C.)* 121 Fed. 171; *Allen v. Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54; *Heide v. Wallace (C. C.)* 129 Fed. 649; *American Clay Mfg. Co. of Pennsylvania v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936. An inference to this effect is justified where, on the party's attention being called to the subject, he unreasonably persists in holding to the imitative dress which he has given to his goods, however innocently intended, at the outstart. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Van Houten v. Hooton Cocoa Co. (C. C.)* 130 Fed. 600. But in all this, deception, likely and intended, either actively or constructively, must exist before there is ground for interference.

The basis claimed for it here is the alleged similarity in shape and size of packages and color and style of wrappers in which the common commodity—milk chocolate, extensively manufactured by both parties—is put up. But the elements of the combination by themselves, whatever may be said of them in conjunction, are of the most common and ordinary character, and the connection in which they are employed entirely obvious and natural. Chocolate has long been put up in flat, oblong pieces, as well as in rounds or squares; and that one party has hit upon a convenient size in which these are inclosed, retailing at a certain price, by no means stands in the way of another's adopting it. Chocolate or maroon colored wrappers, moreover, are a very natural suggestion for a chocolate product, and gilt or silver lettering is about all that will show on it. I do not mean to say that in what has thus been brought together by the complainants there may not be ground for the monopoly which they claim, justifying the charge of imitation and infringement on the part of the defendant which is made. There is no doubt considerable chance for confusion on the

part of a careless public in the points of resemblance alluded to, as the incidents brought forward by the complainants go to show. But where, in order to make out a case for a relief, dependence is placed on things so common as those which we have here, which are ordinarily open to any one to use, which may be innocently employed, and which, with different manufacturers laying claim to various modifications, it is not easy to entirely avoid, on application for a preliminary injunction it should be clear that the complainants have an established and exclusive right to pack and dress their goods in the way they assert, on which the defendant is deceptively trying to trade.

I do not wish to say too much at this stage of the case, lest I should prejudge that which may be subsequently proved. But, on the other hand, I am not willing to take an advanced position, as it seems to me I am asked to do, which may not be able to be sustained. As the case now stands, there is nothing, so far as I can see, to show that, whatever use has been made by the complainants of the size and shape of packages and the color and style of wrappers which they employ, the confection which they sell will not be taken by public just as readily in another kind of dress, or that the one has become so identified with the other that any one who adopts it is necessarily convicted of trying to steal their trade. The defendant's goods are plainly and conspicuously marked with his name, as the complainants' are with theirs, and while it is true that both are in gilt letters, the lettering, as well as the accompanying decoration, is distinct and different in each. As to the croquette size package, with respect to which there is the strongest showing and the greatest complaint, the defendant avers that he has stopped its manufacture for some time, and although this might not be sufficient to stay the action of the court, if a clear case of infringement was made out, it is not without its weight here.

Under all the circumstances, I am not convinced that this is a case for a preliminary injunction, and the motion is therefore refused.

PHOTOPLAY PUB. CO. v. LA VERNE PUB. CO., INC.

(Circuit Court of Appeals of the United States, 1921. 269 Fed. 730.)

Separate suits by the Photoplay Publishing Company against the La Verne Publishing Company, Incorporated, and others, and against Frank T. Eastlack and another, to restrain infringement of a trademark and unfair competition. Decree for defendants in each case (261 Fed. 428), and complainant appeals.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge.⁸ The complainant, a Delaware corporation, having its principal office in Chicago, publishes a monthly periodical called "Photoplay Magazine." The defendants publish a periodical

⁸ Parts of the opinion are omitted.

called the "Photo-Play Journal." Both periodicals are devoted to moving pictures, and matters connected therewith, and cover practically the same subject. * * *

Complainant alleges that it and its predecessors have owned, printed, and published continuously since June, 1911, the "Photoplay Magazine," and in June, 1914, complainant had the word "Photoplay" registered as its trade-mark; that since June, 1916, the defendants have been publishing and selling their periodical under the title "Photo-Play Journal," thus using the distinguishing word, "Photoplay," of complainant's title, as a part of their title, so arranged as to copy and colorably imitate the complainant's trade-mark in such manner as to cause confusion and mistake to purchasers, advertisers, and the public generally.

The defendants deny infringement of complainant's rights, and aver that the periodicals are entirely unlike in name, shape, size, general appearance, and color scheme, and that no confusion, deception, or danger to complainant's business or trade can result from the adoption of the word "Photo-Play" as part of the name of their periodical.

Under the pleadings and proofs, the learned trial judge held that the word "Photoplay" is a descriptive term, and not a proper subject-matter of a registered trade-mark. * * * [The word] is used entirely by some persons in the film and moving picture business, instead of the words "moving pictures," "moving picture shows," "movies," etc. The word denotes the reproduction of a play by means of photography. It is purely descriptive of that art. The plaintiff appropriated it as part of the title of its publication, which is devoted to the art to which the word relates. Being a trade word, descriptive of the art, it was *publici juris*, may not be exclusively appropriated, and is not the proper subject of a registered trade-mark. 38 Cyc. 708, 711, 722; *Canal v. Clark*, 80 U. S. (13 Wall.) 311, 20 L. Ed. 581; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Howe Scale Co. v. Wyckoff-Seaman & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. We agree with the learned trial judge, in so far as he based his decree upon the right to an exclusive use of the word by the plaintiff on the ground of a registered trade-mark.

The complainant bases its charge of unfair competition upon a secondary meaning, which it alleges the word has acquired. The word, by early and constant use, it contends, became associated with and came in time to mean and designate its periodical only, and that, in consequence of the adoption of this word as part of the title of defendants' publication, confusion and deception have resulted. If this contention is true, relief should be granted. The learned trial judge reached this conclusion, for he found that the complainant has the exclusive right to the use of the title adopted for its publication, so far

as that title has come to be associated with and to designate by name its particular publication, and it has the further right to protect the title against any other publication being imposed intentionally or otherwise upon purchasers as complainant's publication.

But he found that there had not been in the use of the word, "Photoplay," any purpose or intention on the part of defendants to deceive or palm off their publication for that of the complainant, and that the defendants' use of the word, "Photo-Play," had not "been such as there would be any reasonable expectation that any one, knowing of and wishing to buy the publication of the plaintiff, would be led into mistaking one publication for the other." Whether or not there has been confusion and deception is a question of fact, upon which the decision of this case depends. * * *

In actions of unfair competition, where the goods of one are passed off as those of another, it is not necessary for the complainant to prove that the defendant intended to pass off his goods as those of the complainant. The question is: What is the commercial effect of what he is doing? If the effect is to pass off his goods for those of the complainant, his good intentions or honesty of purpose is not a defense. Intention, however, is not immaterial, for it would be difficult, though not impossible, for a defendant to satisfy the court that his fraudulent conduct would not have the effect that it was intended to have. Wholesalers and retailers may not be deceived, while the purchasing public may be. Many tests may be adopted as to what is calculated to deceive, or what the commercial effect of the thing will be; but the all-sufficient test is whether or not, in the light of experience, the thing has actually confused and deceived. Whether or not there is a reasonable basis for confusion and deception, in the absence of actual commercial test, is a matter of conjecture.

What might fully protect experienced wholesalers and retailers might be wholly inadequate to protect the inexperienced public for whose protection courts are so sensitive and careful. Whatever may be theoretically thought of the difference between the two publications, the proofs establish, we think beyond doubt, that there was actual and considerable confusion in the public mind. A number of witnesses testified that the defendants' publication had been passed off on them for that of the complainant's. This number was not large when compared with the entire circulation of the publication, but it was quite large when the difficulty of securing such testimony is considered. The testimony of these witnesses stands uncontradicted and unimpeached. The only effort the defendants made to impeach it was to show that other persons, mostly experienced in the trade, at other times and places, had not been confused or deceived.

"Photoplay" is the catchword in the title of the complainant's publication, under which it became popular and built up a large circulation, and the defendant, knowing this, adopted the catchword of the title and added to it a distinguishing noun, "Journal," in place of

"Magazine," which in fact does not distinguish. Confusion and deception may readily happen—indeed, may be expected—if the catchword of the defendants' title is used as descriptive of the next word, which, though different, conveys substantially the same idea, when used in describing a periodical of the same art. Defendants, like complainant, framed the title of their publication of two words. It is the same word, "Photo-Play." The fact that defendants have separated the first part of the word by a hyphen from the latter part, which begins with a capital, does not avoid confusion, for this attempted distinction cannot be detected in pronunciation, and may not be seen by purchasers. They substituted the word "Journal" for "Magazine." This makes little difference, if any, because the two words convey substantially the same idea, when used in describing a periodical of the same particular art. They have similar definitions and are closely synonymous. To illustrate, Scribner's Magazine is popularly called "Scribner's," though it is entitled "Scribner's Magazine." If another Scribner were to come into the field, and issue a periodical of this same character, entitled "Scribner's Journal," it is inconceivable that there would not be confusion and deception in the public mind.

We are of the opinion that there is such similarity in the title of the two publications, which the defendants have created by adopting precisely one word of the complainant's title and the synonym of the other, as to cause confusion and deception in the public mind. Relief should therefore be granted. The decree of the court below will accordingly be reversed, with direction to reinstate complainant's bill and enter decree in conformity with this opinion.

EASTERN OUTFITTING CO. v. MANHEIM.

(Supreme Court of Washington, 1910. 59 Wash. 428, 110 Pac. 23, 35 L. R. A. [N. S.] 251.)

Action by the Eastern Outfitting Company against J. Manheim and another, copartners under the name of the Eastern Outfitting Company. From a judgment for defendants, plaintiff appeals.

GOSE, J.⁹ The plaintiff brought this action to enjoin the defendants from using the name "Eastern Outfitting Company." There was a decree in favor of the defendants, enjoining the plaintiff from using the name in the city of Spokane. The plaintiff has appealed.

Appellant is a foreign corporation, organized in the state of California under the name of "Eastern Outfitting Company of Seattle, Washington." In March, 1902, it filed for record in the office of the Secretary of State of this state a certified copy of its articles of incorporation, and otherwise complied with the laws of this state respecting foreign corporations doing business here. The essential facts are that the

⁹ Part of the opinion is omitted.

appellant, since 1902, has been engaged in the business of selling "cloaks and suits, also gents' clothing," in the city of Seattle, and its vicinity. Its mode of doing business, as testified by its manager, has been to sell on credit, receiving a cash payment of a few dollars at the time of the sale, and weekly or monthly payments thereafter until the purchase price is paid. It did no business in the eastern part of the state, aside from a single transaction with one customer who had moved from Seattle to Spokane. It has, in addition to its local trade, a mail order business in the territory adjacent to Seattle.

The respondents were at one time copartners, doing a retail mercantile business in the city of Spokane under the name of "Eastern Outfitting Company." The business was started under this name by the respondent J. Manheim, in April or May, 1905. Later he associated Nathan Manheim with him in the business, and, before the commencement of the action, the latter acquired the entire ownership, and continued to conduct the business in the old name. There is no evidence that the respondents had any trade outside of the city of Spokane. About August, 1909, the appellant undertook to open a place of business in Spokane under the name of "Eastern Outfitting Company," and advertised that it had an exclusive right to the use of that name.

The court found that the business of both the appellant and the respondents is a retail installment business, purely local in character; that the respondents have expended large sums of money in advertising the business, and have established a large cash and installment business under their trade-name; and that in August, 1909, the appellant, with the intention to cheat and defraud the respondents and the public, sought to lure the public into its place of business in the city of Spokane by taking the respondents' trade-name, and thus divert and appropriate their business. The findings are supported by the evidence.

The appellant contends that it has the exclusive right to the use of the name "Eastern Outfitting Company" throughout the state, because of its compliance with the laws of the state with respect to foreign corporations. We cannot concur in this view. The respective parties adopted the same trade-name and engaged in the same general business, but at points remote from each other, and they are to be dealt with precisely as if the names were those of private firms or copartnerships. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94. "No advantage accrues to a name of a corporation because it is borne by a corporation." Nims on Unfair Business Competition, page 198.

The appellant next urges that, upon the principle of unfair business competition, the respondents should be enjoined from the further use of the trade-name. This position is untenable. In considering this question it is essential that the distinction be kept in mind between a trade-name as applied to a local business, and a trade-name as applied to a general business. In *Martell v. St. Francis Hotel Co.*, 51 Wash.

375, 98 Pac. 1116, speaking to the identical question, we said: "The general rule is, as before quoted, that one person may not use the name of another already in the same line of business, so that confusion or injury results therefrom." This principle, stated in varying phraseology, may be found both in the text-books and in the adjudged cases. In cases like the one at bar the fact to be ascertained is, What is the market of the complaining party? His protection is coextensive with his market. Nims, § 114. "But there is no standard except what the court in each particular case believes has worked fraud, or may work fraud or a loss to plaintiff." Nims, § 108. There cannot be unfair trade competition unless there is competition. *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511.

The doctrine of unfair competition is based upon the principle of common business integrity, and equity only affords relief when this principle has been violated. *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014; *Sartor v. Schaden*, *supra*. The mischief which a court of equity will guard against is a confusion in names, or in the identity of parties, or in the goods sold, so as to deceive the public and work a fraud upon the party having a right to the trade-name. *Philadelphia Trust, Safe Deposit & Ins. Co. v. Philadelphia Trust Company (C. C.)* 123 Fed. 534; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, *supra*; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 964.

It is manifest that the respondents, doing a retail business in Spokane, could not pass off their goods as the appellant's goods, or pass themselves off as the appellant. The respondents did not invade the appellant's territory, but, on the other hand, it sought to invade their territory after they had devoted years of time and labor to giving a reputation to the name in the city of Spokane. Before the appellant attempted to open a business in Spokane, there had been no confusion and no deception practiced upon the public or the appellant's customers. We have treated the question as if the parties had used the same trade-name, and have given no consideration to the fact that the words "Seattle, Washington," were a part of the corporate name of the appellant.

The contention of the appellant that the name is its trade-mark cannot be upheld. As a general rule a trade-mark has reference to the thing sold, whilst a trade-name embraces both the thing sold and the individuality of the seller. *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308, 43 L. R. A. 95, 79 Am. St. Rep. 786; *Sartor v. Schaden*, *supra*. "The office of a trade-mark is to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously ap-

plied to the same article." *Canal Company v. Clark*, 13 Wall. 311, 20 L. Ed. 581. * * *

The decree is affirmed.

RUDKIN, C. J., and FULLERTON, J., concur.

MORRIS, J. I dissent. When appellant fully complied with the laws of this state, it became entitled to do business within this state and within the entire state. It had no locality except the state itself. The fact that it selected Seattle as its situs did not confine its business to that city, nor circumscribe to any extent its powers. It was a corporation in Spokane, and as much entitled to do business there and to have its name protected while engaged in such business as it was in Seattle. I do not comprehend upon what theory appellant can be clothed with greater powers in Seattle and less in Spokane. I know no law making such a distinction. Its powers are coextensive with the state, and should be so regarded and protected. Our statute, Rem. & Bal. § 3680, protects it in the exclusive use of its chosen name, and such protection should be extended to all portions of the state.

The judgment should be reversed.

CHADWICK, J. Aside from the considerations advanced by Judge MORRIS, in which I concur, it seems to me that the reasoning of the majority defeats itself. It proceeds upon the theory that a business once established must cover a whole field in its inception rather than upon the evident fact proven by the history of the whole business world; that a business legitimately organized is entitled to the protection of the law in its development from a small local concern to the larger concern into which it has the natural right to grow. Another reason, and to my mind a forceful one, why the judgment of the lower court should be reversed is that the rule allowing an injunction to protect a trade-name cannot be invoked by defendants in this case. The business of defendants is a partnership, and it is an established principle of law that a partnership can have no property in a trade-name which imports that it is a corporation, and especially so where there is a corporation organized and doing business in the state under the same name and under the protection of the statute. *Clark v. Ætna Iron Works*, 44 Ill. App. 510, cited in 38 Am. & Eng. Enc. Law, page 356.

In the same text, at page 368, the rule is laid down that: "A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trade-mark. It is not always clear, nor often very material, in this class of cases, whether protection is afforded upon the ground of technical trade-mark or upon the ground of unfair competition. It is so easy to avoid any similarity, that its mere existence is almost conclusive proof of a fraudulent intent, and

hence of unfair competition. At all events, a deceptive imitation will be enjoined."

The same rule applies by analogy to trade-names. In 10 Cyc., at page 151, the general rule is stated to be that: "While the name of a corporation is not in strictness a franchise, yet the exclusive right to its use may be protected in equity by the writ of injunction by analogy to the protection of trade-marks, just as the name of an individual, a partnership, or a voluntary association may be protected." This would be the rule if we had no statute against the duplication of corporate names, and should certainly be applied where the policy of the law has been declared by the Legislature to be that confusion in names of business concerns shall be avoided.

AMERICAN WALTHAM WATCH CO. v. UNITED STATES WATCH CO.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 85, 53 N. E. 141.
43 L. R. A. 826, 73 Am. St. Rep. 263.)

HOLMES, J. This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or "Waltham Watches," and from marking its watches in such a way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand, and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the words "Waltham," or "Waltham, Mass.," upon plates of its watches, without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is the custom of watch manufacturers so to mark their watches, but, nevertheless, found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to

add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that if the plaintiff, by its method of advertisement, has associated the fame of its merits with the city where it makes its wares, instead of with its own name, that is the plaintiff's folly, and cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burden in advertising the place of its works.

In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds, and would be extended further were it not for the other. *Ferrule Co. v. Hills*, 159 Mass. 147, 149, 150, 34 N. E. 85. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think, the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense. It is true that a man cannot appropriate a geographical name; but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 156, 46 N. E. 386. So, although the plaintiff has no copyright on the dictionary, or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words, unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway v. Banham* [1896] App. Cas. 199. So, the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead v. Brinsmead*, 13 Times Law R. 3; *Reddaway v. Bonham* [1896] App. Cas. 199, 210. See *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 204, 16 Sup. Ct. 1002; *Cream Co. v. Keller*, 85 Fed. 643. And so we doubt not, may a geographical name acquire a similar association with a similar effect. *Montgomery v. Thompson* [1891] App. Cas. 217.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of tak-

ing such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect, and intended effect, of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and that it ought to be done. The elements of the precise issue before us are the importance of indicating the place of manufacture and the discrediting effect of distinguishing words, on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they now are, on the other. It is not possible to weigh them against each other by abstractions or general propositions. The question is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that he was wrong.

Decree for plaintiff.

ELGIN NATIONAL WATCH CO. v. ILLINOIS WATCH CASE CO.

(Supreme Court of the United States, 1900. 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.)

This was a bill filed in the Circuit Court of the United States for the Northern District of Illinois by the Elgin National Watch Company, a corporation organized under the laws of the state of Illinois, having its principal place of business at Elgin and its office in Chicago in that state, against the Illinois Watch Case Company, also a corporation of Illinois, with its principal place of business at Elgin, and certain other defendants, citizens of Illinois.

The bill alleged:

"That prior to the 11th day of April, A. D. 1868, your orator was engaged in the business of manufacturing watches at Elgin, Illinois, which was then a small town containing no other manufactory of watches or watch cases; that your orator had built up at said town a very large business in the manufacture of watches and watch movements, and that said watches and watch movements so made by your orator, had become known all over the world, and had been largely sold and used, not only in this, but in foreign, countries.

"* * * That at and before said 11th day of April, A. D. 1868, your orator had adopted the word 'Elgin' as a trade-mark for its said watches and watch movements; that said trade-mark was marked upon the watches and watch movements made by your orator, both upon those which entered into commerce in this country and those which were exported to and sold in foreign countries; that your orator's watches became known all over the world as Elgin watches, and their origin and source, as a product of your orator's manufacture, were

distinguished from those of all other watches manufactured in any part of the world by said distinguishing word or trade-mark, 'Elgin'; that from said 11th day of April, A. D. 1868, to the present time, your orator, both in the goods manufactured and sold by it in this country and those exported by it to and sold in foreign countries, has continued to use said trade-mark upon its watches and watch movements, and is still using it, and that said trade-mark has always served and still serves to distinguish your orator's product from that of all other manufacturers.

"* * * That at the time of its adoption of said trade-mark no other person, firm, or corporation engaged in the manufacture or sale of watches was using the word 'Elgin' as a trade-mark or as a designation to designate its goods from those of other manufacturers, and that your orator had the legal right to appropriate and use the said word as its lawful trade-mark for its watches and watch movements.

"* * * That the watches and watch movements made by your orator have achieved a very great reputation throughout the world, and that such reputation is of great commercial value to your orator in its business aforesaid."

It was further averred "that, on the 19th day of July, A. D. 1892, under the act of Congress relating to the registration of trade-marks, your orator caused said trade-mark to be duly registered in the Patent Office of the United States according to law, as by the certificate of said registration, or a copy thereof, duly certified by the Commissioner of Patents, here in court to be produced, will more fully and at large appear."

The bill charged that defendants had infringed the rights of complainant by engraving or otherwise affixing the word "Elgin" to the watch cases made and sold by them; that such watch cases were adapted to receiving watch movements of different construction from those made by complainant; that inferior watch movements were liable to be and often were incased in them; and that when so incased the entire watch, including both movement and case, appeared upon the market with the word "Elgin" upon it, thereby leading the public to believe that the watch as an entirety was made by the complainant, and enabling parties wrongfully using complainant's trade-mark to profit by the great reputation of complainant, to palm off other and inferior goods as goods made by complainant, to injure the reputation of complainant as a watchmaker, and to deprive it of a portion of the business and patronage which it would otherwise receive from the public, to the irreparable damage of complainant.

The prayer was for damages and for an injunction to restrain defendants "from directly or indirectly making or selling any watch case or watch cases marked with your orator's said trade-mark, and from using your orator's said trade-mark in any way upon watches or watch cases or in the defendants' printed advertisements, circulars,

labels, or the boxes or packages in which their said watch cases are put or exposed for sale."

A demurrer having been overruled, defendants answered denying the legality of the registration of the alleged trade-mark, and any attempt on their part to deceive the public, or the doing of anything they did not have the legal right to do; and asserting that they had never manufactured or offered for sale watches or watch movements; that they manufactured at Elgin watch cases only; that complainant had never manufactured or sold watch cases with the word "Elgin" on them; that the business of the two companies was separate and distinct; and that whenever the defendant company had used the word "Elgin" it had usually, if not invariably, been done in connection with some other word, as "Elgin Giant" or "Elgin Commander" or "Elgin Tiger," or some other word in combination with the word "Elgin"; that defendant company had never used the word "Elgin" alone, or separately, as registered by complainant, upon goods exported to foreign nations or used in foreign commerce, but only in domestic commerce, and to inform the public of the place where watch cases of the defendant company were manufactured; that such watches were sold upon a guaranty running for a number of years, so that it was necessary to indicate the name of the location where defendant company was carrying on its business, that purchasers might be able to find the company in case it became necessary to call upon it to make good its guaranties; "and that owing to the distinct lines of business in which the complainant and the defendant company are engaged, no misunderstanding or confusion has arisen or can arise, as these defendants are informed and believe."

It was further alleged "that the word 'Elgin,' being a geographical name or word indicating the name of a prominent manufacturing city in which any manufacturer of watches, watch movements, or watch cases is at liberty to locate and carry on his business, is not appropriable by any single manufacturing person, firm, or corporation, but is open as of common right to the use of any person, firm, or corporation carrying on business at the city of Elgin."

Replication was filed, proofs taken, and a hearing had. By leave of court complainant amended its bill, alleging that the watch cases so manufactured and marked by defendants in violation of complainant's rights were intended by defendants to be sold in foreign countries, and were in fact exported to and sold in foreign countries.

The Circuit Court decreed that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of complainant's exclusive rights in the premises, and that an injunction issue restraining the use of the word alone or in connection with other words or devices, upon watches, or watch cases, or packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchasers or others to mistake said watches or the

watch movements incased in said watch cases for watches or watch movements manufactured by complainant. 89 Fed. Rep. 487. The case having been carried to the Circuit Court of Appeals, that court reversed the decree of the Circuit Court, and remanded the cause, with instructions to dismiss the bill. 35 C. C. A. 237, 94 Fed. Rep. 667.

Mr. Chief Justice FULLER delivered the opinion of the court:

The Circuit Court of Appeals held that the bill must be dismissed for want of jurisdiction. The parties to the suit were all citizens of Illinois, and the court was of opinion that it could not be maintained under the Act of March 3, 1881 (21 Stat. 502, c. 138).

In the Trade-mark Cases, 100 U. S. 82, sub nom. *United States v. Steffens*, 25 L. Ed. 550, this court held that the Act of July 8, 1870, carried forward into sections 4937 to 4947 of the Revised Statutes, was void for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to that which was subject to the control of Congress. The cases involved certain indictments under the Act of August 14, 1876, "to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods," and the opinion treated chiefly of the act of 1870 and the civil remedy which that act provided, because, as Mr. Justice Miller observed, "the criminal offenses described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it."

In its opinion the court, adhering to the settled rule to decide no more than is necessary to the case in hand, was careful to say that the question "whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided." And, further: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks and of the duty of Congress to pass any laws necessary to carry treaties into effect."

The Act of March 3, 1881, followed. By its first section it was provided that "owners of trade-marks used in commerce with foreign nations or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes, which by treaty, convention, or law, afford similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with" certain specified requirements.

By the second section the application prescribed by the first "must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration" "that such party has at the

time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated."

The third section provided that "no alleged trade-mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as before mentioned, or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise; or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

By the fourth section certificates of registration of trade-marks were to be issued, copies of which and of trade-marks and declarations filed therewith should be evidence "in any suit in which such trade-marks shall be brought in controversy;" and by section 5 it was provided that the certificate of registry should remain in force for thirty years from its date, and might be renewed for a like period. By the eleventh section nothing in the act was to be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe." The seventh section was as follows:

"That registration of a trade-mark shall be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy."

Thus it is seen that under the act registration is prima facie evidence of ownership; that the certificate is evidence in any suit or action in which the registered trade-mark is brought in controversy; that the act practically enables treaty stipulations to be carried out, and affords the basis for judicial redress for infringement in foreign countries, where such redress cannot ordinarily be had without regis-

tration, as well as in the courts of the United States, when jurisdiction would not otherwise exist. For it is the assertion of rights derived under the act which gives cognizance to courts of the United States when the controversy is between citizens of the same state, though the benefits of the act cannot be availed of if the alleged trade-mark is not susceptible of exclusive ownership as such, and not, therefore, of registration.

Trade-marks are not defined by the act, which assumes their existence and ownership, and provides for a verified declaration by applicants for registration, that they have the exclusive right to the particular trade-mark sought to be registered.

The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.

And the general rule is thoroughly established, that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 Sup. Ct. 625; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144, 14 Sup. Ct. 151; and cases cited.

The word "Elgin" is and has been for very many years the name of a well-known manufacturing city in Illinois. The factory and business of appellees were located at Elgin, and in describing their watch cases as made there it is not denied that they told the literal truth so far as that fact was concerned, and this they were entitled to do according to the general rule. Obviously, to hold that appellant had obtained the exclusive right to use the name "Elgin" would be to disregard the doctrine characterized by Mr. Justice Strong in *Delaware & H. Canal Co. v. Clark*, as sound doctrine, "that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation."

But it is contended that the name "Elgin" had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary significa-

tion has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.

In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.

If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 549, 34 L. Ed. 1004, 11 Sup. Ct. 396; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 37 L. Ed. 847, 13 Sup. Ct. 966; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 41 L. Ed. 118, 16 Sup. Ct. 1002.

In *Singer Mfg. Co. v. June Mfg. Co.* the Singer machines were covered by patents, whereby there was given to them a distinctive character and form, which caused them to be known as the Singer machines, as differing from the form and character of machines made by others. The word "Singer" was adopted by the Singer Company as designative of their distinctive style of machines, rather than as solely indicative of the origin of manufacture. That word constituted the generic description of the type and class of machines made by that company, and on the expiration of the patent, the right to make the patented article and to use the generic name necessarily passed to the public. But, nevertheless, this court held that those who availed themselves of this public dedication to make the machines and use the generic designation did so on condition that the name should be so used as not to deprive others of their rights or to deceive the public. Mr. Justice White, delivering the opinion, said:

"It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a two-fold significance, one generic and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine upon which the name is mark-

ed is made by him, then the right to use the name because of its generic signification would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another."

In *Reddaway v. Banham*, [1896] A. C. 199, much relied on by appellant's counsel, Reddaway was a manufacturer of belting from camel hair, which belting he had called "camel-hair belting" for many years, so that it had become known in the trade as belting of his manufacture. Banham, long after, made belting from the same material, which he sold and advertised as Arabian belting, but subsequently he, or a company he had formed, began to call it "camel-hair belting." Reddaway and Reddaway's Company brought an action for injunction, which was tried before Collins, J. (now Lord Justice Collins), and a special jury. The jury answered certain questions to the effect that "camel-hair belting" meant belting made by plaintiffs as distinguished from belting made by other manufacturers; that the words did not mean belting of a particular kind without reference to any particular maker; that the defendants so described their belting as to be likely to mislead purchasers and to lead them to buy defendants' belting as and for plaintiffs' belting; and that defendants endeavored to pass off their goods as and for plaintiffs' goods, so as to be likely to deceive purchasers. On the findings of the jury, Collins, J., entered a decree for plaintiffs, and granted an injunction restraining defendants "from continuing to use the words 'camel hair' in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture. The case having gone to the Court of Appeal, the decree was reversed, and judgment entered for defendants ([1895] Q. B. 286); and plaintiffs thereupon prosecuted an appeal to the House of Lords, which reversed the court of appeal, and reinstated the decision of Collins, J., with a slight modification. The case was held to fall within the principle, as put by the Lord Chancellor, "that nobody has any right to represent his goods as the goods of somebody else."

Lord Herschell, referring to *Wotherspoon v. Currie*, L. R. 5 H. L. 508, said:

"The name 'Glenfield' had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it *prima facie* means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as 'camel hair' is descriptive of the material of which the plaintiff's belting is made. Lord Westbury pointed out that the term 'Glenfield' had acquired in the

trade a secondary signification different from its primary one, that in connection with the word 'starch' it had come to mean starch which was the manufacture of the plaintiff."

And Lord Herschell further said that he demurred to the view—

"That the defendants in this case were telling the simple truth when they sold their belting as camel-hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true."

These and like cases do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, can lawfully be withdrawn from common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts.

In the instance of a lawfully registered trade-mark, the fact of its use by another creates a cause of action. In the instance of the use in bad faith of a sign not in itself susceptible of being a valid trade-mark, but so employed as to have acquired a secondary meaning, the whole matter lies in pais.

It is to be observed, however, that the question we are considering is not whether this record makes out a case of false representation, or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word "Elgin" as against all the world. Was it a lawfully registered trade-mark? If the absolute right to the word as a trade-mark belonged to appellant, then the Circuit Court had jurisdiction under the statute to award relief for infringement; but if it were not a lawfully registered trade-mark, then the Circuit Court of Appeals correctly held that jurisdiction could not be maintained.

And since, while the secondary signification attributed to its use of the word might entitle appellant to relief, the fact that, primarily, it simply described the place of manufacture, and that appellees had the right to use it in that sense, though not the right to use it without explanation or qualification, if such use would be an instrument of fraud, we are of opinion that the general rule applied, and that this geographical name could not be employed as a trade-mark, and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such.

In view of this conclusion, and of the fact that the question of the constitutionality of the act of Congress was not passed on by the court below, we have refrained from any discussion of that subject.

The Circuit Court of Appeals was right, and its decree is affirmed.

HOWE SCALE CO. OF 1886 v. WYCKOFF, SEAMANS, & BENEDICT.

(Supreme Court of the United States, 1905. 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.)

On Writ and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the District of Vermont enjoining the use of the designation "Remington" or "Rem-Sho" as the name or part of the name of typewriting machines, and remanded the cause with instructions to decree in favor of complainant only as to the name "Remington."

See same case below, 58 C. C. A. 510, 122 Fed. 348.

This was a bill exhibited, in September, 1898, by Wyckoff, Seamans, & Benedict, a corporation of New York, in the Circuit Court of the United States for the District of Vermont, against the Howe Scale Company of 1886, a corporation of Vermont.¹⁰

For some years prior to 1860 E. Remington and his three sons were engaged at Ilion, New York, in the manufacture of firearms under the firm name of E. Remington & Sons. The father died in 1863, and in 1865 the sons, who had continued the business, organized the corporation E. Remington & Sons under the laws of New York. About 1866 E. Remington & Sons produced a breech-loading rifle that obtained great vogue throughout the world, and was and is known as "the Remington rifle." The "Remington sewing machine" and other machines were also manufactured and sold.

In 1873 E. Remington & Sons began the manufacture of a typewriting machine, the most important features of which were invented and patented by Christopher Latham Sholes. It was the pioneer writing machine, and called "the Typewriter," and "the Sholes & Glidden typewriter," and in 1880 the names "Remington" and "Remington Standard" were used instead, as they have since been continuously.

One of complainant's witnesses testified that the typewriter was called "Remington" "for the reason that the name 'Remington' was known the world over, owing to their building guns for foreign governments, building sewing machines, and having one of the largest manufacturing works in the world." In March, 1886, the typewriter branch of the business of E. Remington & Sons was sold to Messrs. Wyckoff, Seamans, & Benedict, and there was also transferred the exclusive right to the name "Standard Remington Typewriter," by which name the assignment states the machines were generally known. The assignment contained the express reservation to E. Remington & Sons of the right to engage in the manufacture and sale of typewriters at any time after ten years from its date.

Complainant's typewriting machines have been for years conspicu-

¹⁰ Part of the statement of facts is omitted.

ously marked with the name "Remington" and with a large "Red Seal" trade-mark on the paper table and frame; the name and address "Remington Standard Typewriter, manufactured by Wyckoff, Seamans, & Benedict, Ilion, N. Y., U. S. A.," on the cross bar in front of the keyboard; the words and figures "No. 6 Remington Standard Typewriter No. 6" on the front of the base, and the words "This machine is protected by 67 American and foreign patents" on the back. "Remington" and "Remington Standard" and the "Red Seal" have all been registered by complainant as trade-marks.

In 1892 Z. G. Sholes, a son of Christopher Latham Sholes, invented a typewriting machine, and early in 1893 the Z. G. Sholes Company was organized under the laws of Wisconsin for its manufacture, but the stock of the company was never issued, and no machine was ever made or sold by it. Later in the year Franklin and Carver Remington, sons of Samuel Remington, formerly president of the E. Remington & Sons corporation, bought a three-fourths interest in Sholes' invention, Sholes retaining one fourth, and a like interest in the stock of the company paying from eight to nine thousand dollars. They entered into a written agreement with Sholes, which provided, among other things, that "no further, other, or different business of any kind or nature shall be transacted by said corporation or in its behalf, except that the same may be dissolved, in due form of law, as soon as practicable hereafter." Franklin Remington gave his entire time to the promotion of the enterprise, and advanced for expenses from six to seven thousand dollars in addition to the original investment of eight or nine thousand. The name of the machine was subsequently changed by Sholes from "the Z. G. Sholes" to "the Remington-Sholes."

Thereafter the Remingtons and Sholes induced Head and Fay of Chicago to furnish funds to manufacture the Remington-Sholes machine; and a corporation organized in the spring of 1894 for its manufacture was designated the "Remington-Sholes Typewriter Company." This company purchased tools and machinery, and its typewriting machines were placed on the market in December, 1894. In the fall of 1896 the company had become so deeply indebted that it became necessary to take steps to meet its obligations, and at a meeting of the stockholders December 14, 1896, it was resolved that the property and assets be sold at public auction, the buyer to have the privilege of using all or any part of the company's corporate name. Thereupon Fay purchased in his own name, but as trustee for himself and other stockholders, the whole of the assets of the company, together with its good will, the exclusive right to use its trade-marks, etc., and for some months carried on the business at the factory formerly occupied by the Remington-Sholes Typewriter Company. The charter of that company was surrendered in April, 1897, and the Remington-Sholes Company was incorporated under the laws of Illinois, and purchased all the assets, good will, trade-marks, trade-names,

etc., theretofore belonging to Fay and the Remington-Sholes Typewriter Company. And the new company continued at the same factory and through the same instrumentalities to manufacture and sell its typewriters. It was stipulated that the common stock of the new company "was divided among the stockholders in keeping with the amounts of cash actually invested by them in the Remington-Sholes Typewriter Company, and that the allotment of said common stock to said Franklin Remington was in keeping with such plan."

The machines made and sold by the Remington-Sholes Typewriter Company were plainly marked with the words "Remington-Sholes, Chicago." After the new company entered on the business the trade-mark "Rem-Sho" was adopted (registered as a trade-mark October 19, 1907), and the machines were also marked on the cross bars with the words "Remington-Sholes Company, Mfrs., Chicago." The Remington-Sholes Typewriter Company widely advertised that its machine "was not the Remington Standard typewriter," and the catalogues circulated by the Remington-Sholes Company declared: "We state, then, emphatically that this company has no connection whatever with that well-known and excellent machine, the Remington Standard typewriter, and caution possible customers against confusing the 'Rem-Sho' with that machine or any other."

Mr. Chief Justice FULLER delivered the opinion of the court:

Referring to the Remington-Sholes Company, it was unanimously held by the Circuit Court of Appeals: "We do not find in this voluminous record sufficient evidence that defendant has itself done anything to promote confusion in the minds of the public, except to use the name 'Remington' on its machines and in its literature."

Accepting that conclusion, it follows that complainant's case must stand or fall on the possession of the exclusive right to the use of the name "Remington."

But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it, and as the name "Remington" is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such could not in itself give it validity. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 Sup. Ct. 625; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 41 L. Ed. 118, 16 Sup. Ct. 1002; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 45 L. Ed. 365, 21 Sup. Ct. 270.

The general rule and the restrictions upon it are thus stated in *Brown Chemical Co. v. Meyer*. There plaintiff had adopted as a trade-mark for its medicine the words "Brown's Iron Bitters," and the defendants used upon their medicine the words "Brown's Iron Tonic." This court, after commenting upon the descriptive character of the words "Iron Tonic," and confirming the defendants' right to the use of these, said:

"It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name who are using it for a legitimate purpose; although cases are not wanting of injunctions to restrain the use, even of one's own name, where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it."

And, after citing numerous authorities, Mr. Justice Brown, delivering the opinion, continued:

"These cases obviously apply only where the defendant adds to his own name imitations of the plaintiff's labels, boxes, or packages, and thereby induces the public to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest, and fair exercise of such right, he is no more liable for the incidental damages he may do a rival in trade than he would be for an injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria*."

In *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. Ed. 118, 16 Sup. Ct. 1002, the rule is thus laid down by Mr. Justice White:

"Although 'every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice, or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.'"

In the present case, the decree enjoined the use, "in any manner whatsoever," "of the designation 'Remington' as the name, or part of the name, of any typewriting machine whatsoever manufactured by the Remington-Sholes Company, or by defendant or any person or concern, and from selling, offering, exposing or advertising for sale by means of signs, show cards, catalogues, circulars, publications, advertisements, or by word of mouth, or in any manner whatsoever, typewriting machines manufactured by said Remington-Sholes Company or by defendant, or any person or concern under the name of or as 'Remington-Sholes,' or by any designation of which the word Remington shall constitute a part." This denies the right to use the personal name, rather than aims to correct an abuse of that right, and involves the assertion of the proposition that the use of a family name by a corporation stands on a different footing from its use by individuals or firms. But if every man has the right to use his name reason-

ably and honestly, in every way, we cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 32 L. Ed. 535, 9 Sup. Ct. 166, was a suit by a corporation of New York against a corporation of Connecticut, to restrain the use in business of the name "Goodyear's Rubber Manufacturing Company," or any equivalent name. It was held that "Goodyear Rubber" described well-known classes of goods produced by the process known as Goodyear's invention; and that such descriptive names could not be exclusively appropriated. And Mr. Justice Field, delivering the opinion, said: "Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specifications, create any exclusive right to the use of the name."

The principle that one corporation is not entitled to restrain another from using in its corporate title a name to which others have a common right, is sustained by the discussion in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144, 14 Sup. Ct. 151, and is, we think, necessarily applicable to all names *publici juris*. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. 903, 22 C. C. A. 236, 46 U. S. App. 188, 76 Fed. 372; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, 30 N. E. 339; *Monarch v. Rosenfeld*, 19 Ky. L. Rep. 14, 39 S. W. 236.

It is said that the use of the word "Remington" in the name "Remington-Sholes" was unnecessary—as if necessity were the absolute test of the right to use. But a person is not obliged to abandon the use of his name or to unreasonably restrict it. The question is whether his use is reasonable and honest, or is calculated to deceive.

"It is a question of evidence in each case whether there is false representation or not." *Burgess v. Burgess*, 3 De G. M. & G. 896.

The Circuit Court of Appeals in the present case quotes with approval from the concurring opinion of Wallace, J., in *R. W. Rogers Co. v. William Rogers Mfg. Co.*, 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1019, that "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. * * * The incorporators chose the name unnecessarily, and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

This, of course, assumes not only that the name selected was calculated to deceive, but that the selection was made for that purpose.

In *Turton v. Turton*, L. R. 42 Ch. Div. 128, plaintiffs had carried on the iron business as "Thomas Turton & Sons." Defendant began the same business as John Turton, then traded as John Turton & Co., and finally took in his sons and changed the firm name to "John Turton & Sons." Some confusion had arisen, and plaintiffs contended that there was no necessity for defendants to use their own names.

Lord Esher said: "Therefore the proposition goes to this length: That if one man is in business, and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business he must discard his own name and take a false name. The proposition seems to me so monstrous that the statement of it carries its own refutation."

And Lord Macnaghten said in *Reddaway v. Banham*, [1896] A. C. p. 220: "I am quite at a loss to know why *Turton v. Turton* was ever reported. The plaintiff's case there was extravagant and absurd." And see *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 406.

In our opinion the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name "Remington-Sholes" for their machine, and in giving that name to the corporation formed for its manufacture and sale.

The formation of a corporation as an effective form of business enterprise was not only reasonable in itself, but the usual means in the obtaining of needed capital. And as Wallace, J., said: "It was natural that those who had invented the machine, and given all their time and means in introducing it to the public, when they came to organize the corporation which was to represent the culmination of their hopes and efforts should choose their own name as the corporate name. In doing so I think they were exercising only the common privilege that every man has to use his own name in his own business, provided it is not chosen as a cover for unfair competition. They did not choose the complainant's name literally, or so closely that those using ordinary discrimination would confuse the identity of the two names, and that differentiation is sufficient to relieve them of any imputation of fraud."

The name "Remington-Sholes Company" is not identical with, or an imitation of, "Remington Standard Typewriter Company," or "Remington Typewriter Company," or "E. Remington & Sons." Defendant's marks "Rem-Sho," "Remington-Sholes Co., Mgrs., Chicago," are not identical with, or an imitation of, complainant's marks "Remington," Large Red Seal; "Remington Standard Typewriter, manufactured by Wyckoff, Seamans, & Remington, Ilion N. Y., U. S. A.," "Remington Standard Typewriter."

The use of two distinct surnames clearly differentiated the machines of defendant from those of complainant, and when defendant's cards,

signs, catalogues, instructions to agents, etc., are considered, it seems to us that the record discloses, to use the language of Mr. Justice Field in the Goodyear Case, a persistent effort on defendant's part "to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it has no connection with the plaintiff." Doubtless the Remington and Sholes, in using the name "Remington-Sholes," desired to avail themselves of the general family reputation attached to the two names; but that does not in itself justify the assumption that their purpose was to confuse their machines with complainant's; or that the use of that name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names, and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.

As observed by Mr. Justice Strong in the leading case of Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581: "Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." And by Mr. Justice Clifford, in McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828: "A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate the one from the other." And by Mr. Justice Jackson in Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. Ed. 1144, 14 Sup. Ct. 151: "Even in the case of a valid trade-mark the similarity of brands must be such as to mislead the ordinary observer." And see Coats v. Merrick Thread Co., 149 U. S. 562, 37 L. Ed. 847, 13 Sup. Ct. 966; Liggett & M. Tobacco Co. v. Finzer, 128 U. S. 182, 32 L. Ed. 395, 9 Sup. Ct. 60.

We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. And, in our view, defendant's name and trade-mark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case.

Decree of Circuit Court of Appeals reversed; decree of Circuit Court also reversed, and cause remanded to that court, with a direction to dismiss the bill.

L. E. WATERMAN CO. v. MODERN PEN CO.

(Supreme Court of the United States, 1914. 235 U. S., 88, 35 Sup. Ct. 91, 59 L. Ed. 142.)

Mr. Justice HOLMES delivered the opinion of the court:

This suit was brought by the L. E. Waterman Company to enjoin the Modern Pen Company from using in connection with the manufacture and sale of fountain pens, other than those of the plaintiff's make, the name "A. A. Waterman" or any name containing the word "Waterman" in any form, and for an account. The decision of the Circuit Court of Appeals upon an order for a preliminary injunction is reported, 105 C. C. A. 408, 183 Fed. 118; that of the District Court upon the merits, 193 Fed. 242; and that of the Circuit Court of Appeals, 117 C. C. A. 30, 32, 197 Fed. 534, 536. The final decree, in the parts material here, restricted the defendant to using the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co.," and required the words "not connected with the L. E. Waterman Co." to be juxtaposed in equally large and conspicuous letters when the permitted name was marked upon any part of the fountain pen sold by the defendant, or upon boxes containing such pens, and whenever the name was used by way of advertisement or otherwise to denote any fountain pens made or sold by the defendant, or to denote that it was the maker or seller of such pens. 105 C. C. A. 408, 183 Fed. 118, 193 Fed. 248; 117 C. C. A. 30, 32, 197 Fed. 535, 536. See further, *L. E. Waterman Co. v. Standard Drug Co.*, 120 C. C. A. 455, 459, 202 Fed. 167, 171. The bill, besides alleging diversity of citizenship and unfair competition, seemingly relied upon the registration of "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y.," as trade-marks under the act of Congress of March 3, 1881, c. 138, 21 Stat. 502, U. S. Comp. Stat. 1901, p. 3401, as a ground of jurisdiction. *Jacobs v. Beecham*, 221 U. S. 263, 274, 55 L. Ed. 729, 732, 31 Sup. Ct. 555. Both parties appeal.

The defendant's appeal is from the requirements that it use the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co.," and that it juxtapose the words "not connected with the L. E. Waterman Co." After the finding of two courts and upon the evidence it must be assumed that the defendant had used the name Waterman in such a way as to mislead the public and to interfere with the plaintiff's rights unless the defendant had the right to use the name as matter of law, because it was the selling agent of a firm calling itself "A. A. Waterman & Co.," and deriving its name from a man who started in business long after the plaintiff had acquired whatever rights it has. In support of this proposition the defendant lays hold of language in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, 49 L. Ed. 972, 986, 25 Sup. Ct. 609, and in other books, to the effect that courts will not interfere with the use of a party's own name "where the only confusion, if any,

results from a similarity of the names, and not from the manner of the use." But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by, the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 559, 52 L. Ed. 616, 620, 28 Sup. Ct. 350. There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud. *Id.*; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 136, 49 L. Ed. 972, 984, 25 Sup. Ct. 609; *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273, 52 L. Ed. 481, 487, 28 Sup. Ct. 288. In the *Howe Scale Co.* case it was stated upon the same page with the passage quoted that "defendant's name and trade-mark were not intended or likely to deceive."

The only other ground for the defendant's appeal that needs a word after the findings below is a decree of the Supreme Court of New York in a suit by the plaintiff against Arthur A. Waterman and Edward L. Gibson, partners doing business as the A. A. Waterman Pen Company of New York and Boston. The defendant alleges that it has succeeded to A. A. Waterman's rights. The decision found in the strongest terms that the name was used with fraudulent intent, and the decree in some detail enjoined the defendant from using that or any corporate name containing the word "Waterman," and from using in connection with the business of making or selling fountain pens the word "Waterman" alone or with others in such collocation with the word "pen" as to indicate that such pens were a variety of Waterman's fountain pens. This rather damaging decree is thought to give some help because of a following sentence to the effect that the defendants were not prohibited from indicating that their pens were made or sold for or by Arthur A. Waterman & Co. or A. A. Waterman & Co. But that sentence was subject to the previous prohibition and consistent with it. The present defendant still not only may indicate the source of its pens in undeceptive ways, but may mark them "Arthur A. Waterman & Co." if only it add words that prevent the fraud that it insists upon the right to effect. It is unnecessary to go into other considerations presented by the record to show that the defendant's appeal cannot be maintained.

The plaintiff's appeal is from the failure of the decree to prohibit the use of the name "Arthur A. Waterman & Co." even with the suffix required by the court. The ground upon which it claims this broader relief is that the agreement with A. A. Waterman by which he purported to become a partner in the firm of A. A. Waterman & Co. was a sham, that the firm does not make the pens sold by the defendant, and that all the arrangements between Waterman, the firm,

and the defendant were merely colorable devices to enable the defendant to get the name upon its pens. If we were to adopt this view of the facts the nature of the parties' rights and powers perhaps might need a more careful discussion than, so far as we are aware, it has received as yet. Under the decree in its present form the plaintiff gets all the protection to which it is entitled as against another Waterman who has established himself in the business, even though one of his motives for going into it was the hope of some residual advantages from the use of his own name. If with the warning that the law decrees sufficient to prevent a fraud a second Waterman could go into the business and give it his name, the question occurs whether a man might not change his name to Waterman and do the same thing; and, if so, whether the nature of the defendant's title to the name is any concern of the plaintiff—whether, in short, the protection now granted is limited by reason of a personal privilege, or is the measure of the plaintiff's rights as against the world. We express no opinion upon the point beyond saying that it would have to be considered before the plaintiff could obtain a broader decree. For the purposes of decision we give the plaintiff the benefit of the doubt.

Whatever view may be taken of the agreements, there is no question that they were intended, with A. A. Waterman's assent, to authorize the use of his name in a business that he had pecuniary reasons for wishing to see succeed. He purported to transfer to the partnership the good will attaching to his name. While it very well may be true that the transfer of a name without a business is not enough to entitle the transferee to prevent others from using it, it still is a license that may be sufficient to put the licensee on the footing of the licensor as against the plaintiff. Moreover, two courts have upheld the arrangements as effective to give the defendant the protection of such rights as A. A. Waterman would have had in establishing a business after the plaintiff, and therefore we shall not go into any consideration of the facts.

It cannot be said the partnership agreement was ineffectual for the present purpose as matter of law. The object is pretty plain, but it is none the worse for that. The leading features are as follows: A partnership is formed under the name "A. A. Waterman & Co." Contributions of capital are to be deemed loans and bear interest. The two partners other than Waterman have the management of the business and alone can sign negotiable paper and contracts. The business is to make, buy, and sell fountain pens, and the defendant corporation is to be formed (the parties to be interested in it), and is to be the sole selling agent of the firm. Waterman grants to the firm the exclusive use of his own and the firm names in connection with the business, and all the good will attaching to either. The continent is divided into two defined districts, and Waterman has the exclusive right to do business under the name "A. A. Waterman & Co." in the Western district, if he begins it before July 1, 1906, and the remain-

ing members the exclusive right to the Eastern district. In any event Waterman leaves the present firm at that date. Each party has the free use of all patents, trade-marks and trade-names within their territories that either party has or may acquire. Eastern territory goods are to be marked "A. A. Waterman & Co., New York, and those made in the western, "A. A. Waterman & Co. (or some similar name) Chicago." Waterman covenants not to compete for thirty-six years, or to use or allow the use of his name except as provided. Finally, if Waterman does not go into independent business, he is to have the exclusive agency for the Western territory for the thirty-six years, and his commissions are fixed in detail and with care.

As we have said, we do not reopen the matters of fact that must be taken to have been found by the two courts. So we assume that there was nothing to hinder Waterman from making this agreement, and that the defendant was organized and acted under it. Whether he had more or less good will to convey perhaps is not very material. We are not prepared to say as matter of law that a man who for years has been trying to do business may not join a partnership for a time long enough to start it with his name and whatever good will he has, and provide that thereafter he will divide territory as above stated, or become a selling agent, at his choice. The obvious motive is met by the protection given in the decree, but does not deprive him of all rights in his name. A sufficient interest is disclosed to sustain the transfer as against the plaintiff, and to free the defendant from a greater liability than would have fallen on A. A. Waterman had he gone on alone.

Decree affirmed.

Mr. Justice PITNEY. In No. 72, the appeal of the Modern Pen Company, I concur in the result.

In No. 54, the appeal of the L. E. Waterman Company, I dissent from the conclusion reached by the court. It seems to me that the alleged partnership agreement of June 12, 1905, made between Arthur A. Waterman and others, pursuant to which the Modern Pen Company was organized and under which it claims the right to use the name of "A. A. Waterman" and "A. A. Waterman & Co.," appears upon its face to be a mere sham and a fraudulent device, and is demonstrated to be such by the other evidence. The case presents no question respecting the right of an individual to the bona fide use of his name, but rather the question whether a partnership or a corporation can, by purchase or otherwise, obtain the right to use the name of a third party, for the very purpose of employing it in unfair competition with the established business of still another party. The case in its circumstances closely resembles *International Silver Co. v. William H. Rogers Corp.*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804, and, for reasons sufficiently indicated by a reference to that case, I think the Modern Pen Company should be unqualifiedly enjoined from using the name "Waterman."

WALTER BAKER & CO., Limited, v. GRAY.

(Circuit Court of Appeals of the United States, 1911. 192 Fed. 921, 113 C. C. A. 417, 52 L. R. A. [N. S.] 899.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

Bill by Walter Baker & Co., Limited, against Sydney C. Gray and another, partners as the Gray Mercantile Company. Decree dismissing the bill, and complainant appeals.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This was a bill to restrain unfair trade, which the learned trial court dismissed. Hence this appeal.

Complainant is a corporation organized and existing under the laws of the state of Massachusetts, and by divers successions and transfers claims the right, alleged to have originated as early as 1780 in one James Baker, to carry on the business of manufacturing and selling chocolate and cocoa under the trade or corporate name of "Walter Baker & Co." and particularly claims the exclusive right to the use of the word "Baker" in connection with the sale of its chocolate and cocoa. It is charged in the bill that the defendants Sydney C. Gray and Clinton C. Gray, doing business under the firm name of Gray Mercantile Company, at Columbus, in the state of Nebraska, have infringed complainant's rights by selling chocolate and cocoa manufactured by a corporation of New York known as "William H. Baker, Syracuse, Inc.," under the descriptive designation of "Baker's Chocolate" and "Baker's Cocoa."

Defendants in their answer admit complainant's exclusive right to the use of the name "Walter Baker" in any of the combinations specified by it, but deny it has any exclusive right to the use of the name "Baker." They admit they are selling the product of the Syracuse Baker; and allege that for some years prior to 1899 a man by the name of William H. Baker had been engaged in the wholesale grocery business in Syracuse, and in that year determined to embark upon the business of manufacturing and selling chocolate and cocoa; that, with a view to accommodating his business to the rights of Walter Baker & Co. of which he had full information, he devised and adopted a label to be placed upon the packages of his product which so fairly distinguished and differentiated them from the packages of Walter Baker & Co. that no confusion could arise, and that upon a conference between the two concerns the label so devised and adopted by the Syracuse Baker was approved by the Massachusetts corporation; that William H. Baker and his subsequently formed corporation of the same name, soon after commenced to use the label so adopted and approved, expended large sums of money in the development of their trade under it, and continued the use of that label without objection

by Walter Baker & Co. until about the time this suit was instituted in 1904.

By reference to the cases of *Walter Baker & Co. v. Baker* (C. C.) 77 Fed. 181, *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 80 Fed. 889, *Baker v. Baker*, 53 C. C. A. 157, 115 Fed. 297, and *Walter Baker & Co. v. Slack*, 65 C. C. A. 138, 130 Fed. 514, which related to a controversy between the complainant in this case and one W. H. Baker of Winchester, Va. (and not William H. Baker of Syracuse, whose rights are now involved), the genesis and development of complainant's business as well as valuable contributions to the law governing the rights and limitations upon the rights of individuals to make use of their own patronymic as a trade-name can be found; and, in view of the facts there disclosed, little need be said now concerning the general facts of the case. Suffice it to say that complainant's label on the front of its package is and for a long time has been of a distinctive yellow color upon a dark blue background, having on its front side in large black letters: "BAKER'S CHOCOLATE—CELEBRATED AS A NUTRITIVE, SALUTARY AND DELICIOUS BEVERAGE FOR MORE THAN A CENTURY."

This is followed by 10 lines of descriptive matter in small type, and then by the words in large type: "MADE BY WALTER BAKER & CO., LIMITED, DORCHESTER, MASS."

On the reverse side of the package appears in lavender color an attractive picture of a waitress with a white cap and apron, carrying in her outstretched hands a tray with two cups on it. Above the picture are the words, "La Belle Chocolatiere," and below it the words, "Walter Baker & Co., Limited, Registered in U. S. Patent Office."

The label on defendants' package being that of the Syracuse Baker upon whose rights they stand is of white color over a dark blue background. On it, in large green letters, appears this legend:

"JUSTICE Brand CHOCOLATE
 Premium No. 1.
 Highest Grade Made in the World."

Then follow three lines only, of directions in small type; afterwards in bold large type the following: "WILLIAM H. BAKER, SYRACUSE, INC."

On the reverse side of their package is a representation of the Goddess of Justice in scarlet color holding aloft in one hand the scales of justice and in the other conventional sword. Over the head is inscribed in large and prominent letters the words "JUSTICE BRAND," and beneath in like large and prominent letters are the words, "COCOA AND CHOCOLATE, WILLIAM H. BAKER, SYRACUSE, INC."

These labels are strikingly dissimilar, and each prominently and unequivocally discloses the manufacturer of its contents. In the spirit of fairness which seemed to actuate both parties in the year 1899 and

for several years thereafter, the labels were regarded and treated as quite sufficient to prevent any deception or confusion.

In the trial before the Circuit Court no claim was made that the Syracuse label failed to properly distinguish between the product of complainant and the Syracuse Baker, and the case was there argued and decided on the assumption that the labels on defendants' goods (which were the same as those of the Syracuse Baker from whom they purchased them) were undeceptive and lawful. There could not well be, neither has there been, any serious contention that defendants in handling the Syracuse Baker's product have been guilty of unfair competition by simulating complainant's labels or advertising matter. This kind of deception, being that which commonly characterizes unfair competition in trade, is conspicuously absent in this case.

Practically the only contention here is that defendants, who keep the product of both the Bakers for sale in their grocery at Columbus, have been guilty of unfair competition in trade because they have not on an inquiry by customers for "Baker's Chocolate," without more, handed out at once complainant's packages or have not affirmatively called attention to the fact that there were two kinds of Baker's chocolate one Walter Baker's and the other William H. Baker's and asked inquirers which they desired. This contention must be considered in the light of the following facts which are disclosed in the record:

The complainant under the name of "Walter Baker & Co." and its predecessors had for a long time and until about the year 1895, when one W. H. Baker of Virginia and later William H. Baker of Syracuse, engaged in the chocolate business, enjoyed a practical monopoly of the name "Baker" in connection with that business. Prior to this date its product had been commonly known and referred to as "Baker's" chocolate or cocoa, and even up to the time the testimony was taken in this case in 1907 the word "Baker" used alone, in common speech, concerning chocolate or cocoa, had generally denoted the product of the complainant company. But the defendants the Gray Mercantile Company prior to the institution of this suit had established a large demand in Columbus for the product of William H. Baker of Syracuse, which had there become so well known for its excellence that many purchased it in preference to the Walter Baker product. There is considerable evidence to the effect that, since William H. Baker of Syracuse entered into the business, a growing disposition has arisen to discriminate between the Bakers, when calling for chocolate. Customers desiring complainant's goods are beginning to call for "Walter Baker's." Even the complainant company in its advertisements in recent years has recognized the necessity for this discrimination and has emphasized it by urging purchasers to specify "Walter Baker's" goods in making their orders. Not only so, but in these later years complainant's product has become very generally

known and ordered by purchasers by distinguishing names other than "Baker's," as, for example, the "Yellow Label," the "Chocolate Girl," and frequently as "Baker's Yellow Label," or "Baker's Chocolate Girl."

The retail selling price of the products of both Bakers at Columbus was the same; but defendants, being able to purchase the Syracuse Baker's chocolate at a less price than the Walter Baker's, made a little greater profit by selling the former to its customers rather than the latter; and, when Baker's chocolate without further specification or other description was asked for, they generally handed out the William H. Baker package. There having been an extensive demand for both these products in and about Columbus, users became entirely familiar with the dress of the different packages, and recognized complainant's as the "Yellow Label" or the "Chocolate Girl," and often called for them by either of those names. These and other distinguishing marks upon complainant's packages were so well known that purchasers of ordinary perception could not have failed to quickly discover that some other brand of chocolate or cocoa had been palmed off for Walter Baker's if such had been attempted. If a William H. Baker package bearing its peculiar and impressive labels had ever been offered to a customer calling for or wanting a Walter Baker package, the latter's sense of sight would have immediately come to his assistance, and it would have been rejected. In the nature of things, therefore, the public has not been deceived; neither has complainant suffered by any surreptitious palming off of defendants' goods in lieu of its own.

Such being the facts, was it the duty of the defendants upon demand by customers for "Baker's" chocolate, without further specifying which kind, to hand out Walter Baker's packages, or explain to customers that there were two Bakers' chocolate and ask which they desired? Or could the defendants who were carrying the goods of both Bakers, on such a demand by a customer, hand out to him the one, by the sale of which they could make the most money, with the hope the customer would accept it and be satisfied?

There are some propositions which in the present state of the law on the subject of unfair competition must be regarded as firmly established. One is that no person can acquire or transmit to his successors in interest any exclusive right to the use of his own surname as against the right of others of the same name to use theirs honestly and legitimately in the prosecution of any business they may decide to engage in. *Howe Scales Co. v. Wyckoff, Seamans, etc., Co.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, and cases cited. If, however, confusion would result or the public be deceived or unwarrantable injury be occasioned by the subsequent adoption and use of a name once lawfully appropriated by a predecessor in business, equity will restrain such subsequent use unless some addition or explanation accompanies the use which indicates clearly that the business or

product of the later comer is different from that of the original one. Herring, etc., *Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, and cases cited. "*Sic utere tuo ut alienum non lædas*" is a wholesome maxim of the law as well as of morals. The application of these principles to the facts of the present case will control its decision.

William H. Baker of Syracuse, as already seen, conformed in respect of his labels and advertisements fully to the requirements of the law just referred to; and the defendants in handling his goods encroached in no manner upon the labels, advertising cuts, displays, or other devices which had characterized complainant's packages. Such being the case, they had the undoubted right to push their business with all legitimate argument and persuasion. When purchasers entered their store and called for Walter Baker's chocolate, they had the right to try and convince them by all honorable means that William H. Baker's product was better than the Walter Baker's product, and to persuade them, if possible, to take it rather than the article they called for. No one would contend this was not fair competition.

In view of the uncontradicted testimony that the prominent yellow label, the striking effigy of the chocolate girl, and the display of the name of "Walter Baker & Co., Limited," so distinguished and characterized complainant's packages that all persons knew them by those tokens or some of them, it seems perfectly obvious that an inquirer for its chocolate would, at once, on being offered a package of the "Justice Brand" manufactured by William H. Baker with its label so strikingly different from those characterizing the Walter Baker product, refuse to accept or keep it, unless they were willing to take it on its own merits. The delivery of a package of the "Justice Brand" on a call for complainant's chocolate would be in effect a proposition to the purchaser to accept that in lieu of what he asked for. In reality, therefore, we fail to see how the tender of a William H. Baker package on a call for complainant's chocolate could deceive any purchaser. Certainly an attempt to deceive in that way would be so palpable as to signally fail of its purpose. A purchaser of ordinary prudence or even the most unwary could not be deceived by it.

The Supreme Court in *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, speaking by Mr. Justice Clifford, said: "A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate one from the other." And in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, speaking by Mr. Justice Jackson, said: "Even in the case of a valid trade-mark the similarity of brand must be such as to mislead the ordinary observer."

But let it be conceded for the moment that complainant's packages are at the present time generally known and recognized by the trade under the name of "Baker's" chocolate or cocoa, and that there are no other names or tokens by which they are known, we are of opinion

that the demands of fair and honest competition did not require the defendants to exercise the solicitude in behalf of their competitor contended for. If the complainant and its predecessors permitted their goods to become known to the trade as "Baker's" without further identification, they did it subject to the possibility that any other person of that name might enter the same business and might properly enough desire his own product to be known by his own name.

Defendants' goods are as accurately described by the word "Baker's" as complainant's are, and they have a natural and perfect right to call them so and a natural and pardonable ambition to induce others to call them by that name.

Because of the fact, however, that another man by the name of Baker had preceded them in the same business, in order to insure fair competition and prevent the perpetration of fraud upon the public, the law, as already pointed out, imposed upon defendants the obligation of so marking and describing their product as to plainly distinguish it from their predecessor's. This, as we have already seen, was done by them to the fullest possible requirement.

If, in addition to this, a merchant in order to escape the charge of fraud must explain to every customer calling for his goods by its natural descriptive and colloquial name the difference between them and those of a competitor entitled to use the same descriptive name, or if a merchant must warn every customer that he is liable to be defrauded by trading with his house, he would in a large degree be deprived of his natural and conceded right to trade in his own name. He would be required to advertise and extol his rival's goods in an attempt to sell his own. We cannot give our assent to the proposition that would impose upon a second comer such an extraordinary degree of care to protect a rival of the same name. The authorities, as we view them, impose upon him this duty and no more. He must by means of his packages, the color, display, and legends upon them, or in some other effective way so plainly distinguish his own product from that of his predecessor that purchasers in the exercise of reasonable care cannot be deceived in respect to it. In this way the undoubted right to use one's own name in business is secured and preserved, and the duty to so use it as not to deceive the public or unnecessarily injure a business competitor of the same name is enforced. The right and the duty thus become reconciled so far as is consistent with their separate existence in one person. [The following cases are here cited and quoted. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 187, 16 Sup. Ct. 1002, 1009, 41 L. Ed. 118; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *McLean v. Fleming* and *Columbia Mill Co. v. Alcorn*, *supra*; *Centaur Co. v. Marshall*, 38 C. C. A. 413, 97 Fed. 785; *Allen & Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54.]

Our conclusion is that defendants' right to offer their goods to the trade as "Baker's" goods is equal to that of complainant's right to

so offer its goods, and that defendants, having fully complied with the law obligating them to so dress their goods as to prevent confusion and enable purchasers when exercising reasonable care to distinguish between them and the goods of others of the same name, have done their full duty either to the public or to the complainant.¹¹

¹¹ It is satisfactorily shown that for a long time prior to this suit purchasers inquiring for 'Baker's Chocolate' would be supplied with W. H. Baker's product, and this because 'we made a little more on that.' Upon the commencement or threatening of the present suit, he instructed his salesmen to say to purchasers demanding 'Baker's Cocoa' or 'Baker's Chocolate,' 'We have two Bakers. Which do you want, W. H. or Walter Baker?' He also said that 9 out of 10 purchasers would not know the difference, saying, 'Which is best? Give me the best.' And the salesman would then furnish the W. H. Baker product. Without enlarging upon this conduct, we think it evidences a deliberate design and intention to deceive. The purchaser was entitled to that which he demanded, to that which had been approved to his taste by experience, or which he had been recommended to purchase. In the market there were no 'two Baker's' products. There was but one, and that was the product of Walter Baker & Co., Limited. The courts had enjoined William Henry Baker from using the word 'Baker' alone, and had required to be prominently placed upon each package the statement that 'W. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Company.' No such statement or representation was by the appellee directed to be made to the inquirer for 'Baker's Chocolate' or 'Baker's Cocoa.' Instead, there is manifested a clear design to mislead and confuse the proposing purchaser with the statement that there were two 'Baker' products in the market. The courts sanctioned the use by William Henry Baker of his name 'Baker' upon the packages, with the explanation stated, to avoid, as far as possible, confusion of goods; but they did not sanction the use of the name 'Baker' in connection with the term 'chocolate' or 'cocoa.'

"We have no difficulty, therefore, in finding that the appellee, with full knowledge of the situation, sought to palm off the spurious goods as the genuine. The court below was evidently of that opinion, but by its decree enjoined the appellee from selling 'any cocoa or chocolate other than that made by Walter Baker & Co., Limited, in response to requests for "Baker's Cocoa" or "Baker's Chocolate," unless prior to such sale the purchaser is actually notified that the cocoa or chocolate about to be furnished is not manufactured by the old chocolate manufacturer, Walter Baker & Co.' This, as we conceive, gave the appellee leave to sell the spurious article as 'Baker's Cocoa' or 'Baker's Chocolate,' if it was accompanied by the statement that it was not manufactured by the old chocolate manufacturer, Walter Baker & Co. We may safely take it for granted that not one in a thousand knowing of or desiring to purchase 'Baker's Cocoa' or 'Baker's Chocolate' know of Walter Baker & Co., Limited. The name 'Baker' is identified with the product, and known, in connection with the product of the appellant, as a badge and guaranty of excellence. To sanction the sale of the spurious article as 'Baker's Chocolate' or 'Baker's Cocoa,' even if accompanied with the statement that it was manufactured by William Henry Baker and not by the old manufacturer, Walter Baker & Co., Limited, would not inform the purchaser that it was a different article, or other than the article known to the trade and to the world as 'Baker's Chocolate' and 'Baker's Cocoa,' and the identity of the name is the more subtle in the deception. The purchaser was entitled to that for which he had asked. We do not mean to say that it is not within the province of the seller to represent to the proposing purchaser that another article which he has is superior in excellence to that which is called for, and to induce him by proper argument or statement to purchase that other, but he must not represent such other to be the product which the purchaser had called for. In this respect we think the decree below failed to give adequate relief."

Per Jenkins, Circuit Judge, in *Walter Baker Co. v. Slack*, 130 Fed. 514, 518-519, 65 C. C. A. 138, 142 (1904).

By heeding the maxim *caveat emptor*, the public will be protected; and complainant, for reasons already stated, will not suffer any legal injury.

The decree of the Circuit Court dismissing the bill is affirmed.¹²

BORTHWICK v. THE EVENING POST.

(Supreme Court of Judicature, 1888. L. R. 37, Ch. Div. 449.)

This was an action by Sir Algernon Borthwick, Bart., the proprietor of the Morning Post newspaper, to restrain the Defendants from publishing a newspaper under the title of "The Evening Post," or under any other title of which the word "Post" formed part, so as to represent or induce the belief that the defendants' newspaper was a late or evening edition of the Morning Post. * * *

The plaintiff moved for an interim injunction, and the hearing of the motion was by arrangement treated as the trial of the action. The motion was heard before Mr. Justice Kay on the 13th of January, 1888.¹³

KAY, J. The proprietor of the Morning Post seeks an injunction to restrain the defendants from publishing in London a daily paper under the name of the Evening Post. The parties have agreed before me to treat this as the trial of the action, and not to object to the historical part of the evidence on the ground that it is merely founded on information. The important facts are that the Morning Post is an old-established London daily paper, founded in 1772. For a period of twenty-five years, up to about five years ago, a second edition was published at 1 p. m. under the same title, which, it is said, was practically an evening edition. This has been done intermittently since that time by publishing second or later editions when circumstances required, and these are regularly taken by some of the subscribers.

The defendants are a limited company who have acquired the control of a paper called the Daily Recorder, said to have been established nearly 100 years ago as the Daily Recorder of Commerce. This company are publishing the newspaper complained of, which they call the Evening Post, adding, in smaller type under the title, "with which is incorporated the Daily Recorder." The advertisements of the issue of the newspaper omit this addition to the title. The printing of the name and the general typography of the paper resemble those of the Morning Post. The shape is the same, but the size and the number of columns of the letter-press are somewhat different. Before the first issue the plaintiff's solicitor, on the 19th of December, 1887, wrote thus to the defendants: [His Lordship read

¹² The opinion of Smith, Circuit Judge, specially concurring, is omitted.

¹³ Parts of the statement of facts and the opinions of Lord Coleridge, L. C. J., and Cotton, L. J., are omitted.

the letter.] This was answered on the same day by a letter, courteous and argumentative, denying the alleged right, and intimating that any proceedings would be resisted. Thereupon this action was immediately commenced, and the question is now submitted to me for decision as at the trial.

The first point is that the plaintiff does not suggest that any one would mistake the defendants' paper for the Morning Post. The suggestion is that it will be mistaken for an evening issue of that paper. This, it is urged, is an injury which may occasion damage to the plaintiff. It is argued that the plaintiff can have no control over the defendants' paper, and that it may be so conducted as to disgust the subscribers to the plaintiff's journal and cause them, for that reason, to cease to take it. Even if well conducted, the political and other opinions put forward in it may be repugnant to the readers of the Morning Post. And apart from these reasons, if mistaken for an evening issue of the Morning Post, persons might buy it in preference to the morning paper, and thus the plaintiff might be damnified.

I think there is considerable weight in these arguments. I have never seen the defendants' paper, except in court, and have no reason to suppose it is not well conducted; but it is much to be regretted that the present condition of things is such that it is easy to understand that the proprietor of a paper of the standing and reputation of the Morning Post, or of any of the leading London newspapers, may reasonably be extremely jealous of having it supposed that another publication over which he has no control is an edition of his newspaper.

There is no doubt of the jurisdiction of the court. It has been often exercised to prevent the use of a name for a newspaper calculated to induce the belief that it was the publication of another newspaper proprietor. Examples of the exercise of such jurisdiction are *Hogg v. Kirby*, 8 Ves. 215, *Edmonds v. Benbow*, *Sebastian's Digest*, p. 16, *In re the Edinburgh Correspondent*, 1 Court Sess. Cas. 1st Series, 407, note, *Prowett v. Mortimer*, 2 Jur. (N. S.) 414, and *Ingram v. Stiff*, 5 Jur. (N. S.) 947, in all of which cases injunctions were granted. Many cases have occurred in which relief was refused on the ground that what was done was not calculated to damage the plaintiff; but in none has the jurisdiction been doubted. Nor was it denied in argument that this jurisdiction might extend to a case like the present.

The test is obvious. If the defendants were to represent on the face of their newspaper, in so many words, that it was an evening issue of the Morning Post, that would be an invasion of the rights of property of the owner of that paper which would at once be restrained. It is the same thing if what they are doing amounts to a tacit representation of that kind. The real question is, has it in fact that effect? The jurisdiction is analogous to that exercised in cases of trade-marks, where the court interferes whenever one tradesman

is attempting to pass off his goods as those of another tradesman. This was originally supposed to rest on the ground that such a proceeding was a fraud. But in the case of *Millington v. Fox*, 3 My. & Cr. 338, it was established that the jurisdiction exists where this has been innocently done. And subsequently Lord Westbury, in *Hall v. Barrows*, 4 D., J. & S. 150, stated the real ground to be the protection of property. And in *McAndrew v. Bassett*, 4 D., J. & S. 380, where the trade-mark was a single word, his Lordship held that a certain property exists in such a word, as applied by way of stamp on a particular vendible article, the moment that article obtains reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public.

This view of the law has since been followed, and it is expressly recognized by Lord Justice Mellish in *Singer Manufacturing Company v. Wilson*, 2 Ch. D. 434, 454, and by Lord Blackburn in *Singer Manufacturing Company v. Loog*, 8 App. Cas. 32, in the House of Lords. It seems to me that this doctrine applies to a case like the one before me. It may well be said that the owner of the *Morning Post* has from its position and reputation a valuable property, of the kind described by Lord Westbury, in the name of his newspaper. But whether he has or not is a question, in my opinion, of no practical importance. He has a valuable property in the newspaper itself. Its standing and reputation have obtained for it a large circulation. Any one who should appropriate part of that circulation by representing another paper to be owned, edited, or written by the owner, editor, or staff of the *Morning Post* would injure and damage the plaintiff's property, and would wrongfully acquire some of that property to himself, just as a tradesman who passes off his goods as the goods of another man inflicts injury and damage on the property of that other man. That is the property which the court interferes to protect, and it interferes by injunction because the damage, though it may be great, is scarcely capable of accurate estimation; and, as Lord Westbury said in *Hall v. Barrows*, 4 D., J. & S. 150, the remedy by an action for damages is, therefore not adequate.

Now, apart from any special evidence, I should come without hesitation to the conclusion that what the defendants are doing is calculated to deceive the public by inducing them to buy the defendants' paper as an evening issue of the *Morning Post*. This is, in my opinion, an injury which will damage the plaintiff. But there is direct evidence that persons have been so deceived. Mr. Colligan, manager of the publishing department of the *Morning Post*, states in his affidavit that prior and subsequent to the issue on the 21st of December last of the defendants' paper, applications were made by not less than twelve persons to him, or in his presence, at the publishing office of the *Morning Post*, with reference to and for copies of the *Evening Post*. All such applicants, he says, evidently considered it

was connected with and issued from the same publishing office as the Morning Post, and was in fact an evening edition of that paper. Mr. Dickson, managing printer of the Morning Post, deposes that on the evening of the 21st of December two several persons called at the publishing office and asked him for copies of the Evening Post, and Mr. Greene, assistant reader on the staff of the Morning Post, states that on the same evening four persons called at the publishing office and asked him for copies of the Evening Post, saying that they thought it was published at the office of the Morning Post; and again, on the 2d of January last, two persons called and made similar inquiries at different times. These were in addition to the inquiries made of Mr. Dickson.

It is not necessary to the plaintiff's case to shew that what the defendants have done was with the intention of passing off their paper as an edition of the plaintiff's; but, if that be so, the case is much stronger. I confess I have the greatest difficulty in believing that the defendants had not that intention. The paper they had acquired and were continuing was called the Daily Recorder, or the Daily Recorder, of Commerce. There must have been some reason for a change of name so complete and extraordinary. The temptation to avail themselves of the reputation of a well-known London newspaper was great. I cannot help inferring that this was partly the reason for adopting the name of the Evening Post.

I must, therefore, grant a perpetual injunction restraining the defendants, their agents and servants, from publishing, selling, or advertising for sale any newspaper by the name of the Evening Post, or by any other name calculated to induce the public to believe that such newspaper is an edition of the Morning Post, or is owned, edited, or written by the owner, editor, or staff of that newspaper. The defendants must pay the costs of the action.

From this judgment the defendants appealed. The appeal came on for hearing on the 17th of January, 1888.

BOWEN, L. J. This seems to me to be a very difficult case, and one very much upon the line, and I am not at all surprised that the proprietor of the Morning Post has taken the action which he did, or that the learned judge in the court below came to a conclusion different from that to which we arrive. Now what is the question we have to ask ourselves—the test of the law which we have to apply? This is an action the gist of which is that by embodying at the head of the paper the title “Evening Post” the defendants, it is said, have put forward an untruthful representation and an untruthful representation which is calculated to injure the property of the Morning Post—the untruthful representation being an implied representation that there was a proprietary connection between the new paper and the old paper. That is the gist of the action. In order to see if it can be supported we must ask ourselves the question, is the title “the Evening Post” cal-

culated to deceive persons into the belief that it was published by the proprietors of the Morning Post in a way likely to injure the business of the Morning Post? Unless this double proposition can be answered in the affirmative, the application for an injunction must fail. In order to succeed the Morning Post must make out that the title "Evening Post" is calculated to deceive people into the belief that the paper is published by the Morning Post, and in a way which is likely to injure the Morning Post. Now, first of all, as to the deception: Is it calculated to deceive? Twenty persons have been deceived. I do not lay, I hope, undue stress upon that. Secondly, why has the title "Evening Post" been deliberately adopted by that paper? The world is wide, and there are many names. Why was there a persistent resolve to take the title "Evening Post," when the Evening Courier, or Evening Gazette, or some other name, might have been taken? The Morning Post apparently is not about to publish an evening paper; but suppose the Morning Post was intending, and did carry out its intention, of publishing an evening edition, what name would it be more natural to choose than the Evening Post? The Daily News, if it published an evening edition, would perhaps call it the Evening Daily News; but you cannot suppose that a paper which is called the Morning Post, if it published an evening edition, would call itself the Evening Morning Post. That would be too absurd. The natural title which the Morning Post could take would be the Evening Post. Now, why has that title been taken? One ought not to hesitate when one is judging facts as well as law to draw a sharp line, and I do not hesitate to draw the inference that the title was taken to deceive somebody. But that is not enough. Is it calculated to deceive the public in a way which would injure the Morning Post? It may be that it is taken to deceive the public without injuring the Morning Post. In my opinion that is exactly what has happened in this case; it has been an attempt to deceive the public, but there has not been shewn to be, within any measurable distance, any probability of injuring the Morning Post. The Morning Post is an old established paper—everybody knows it—its character and politics, and literary position. I am of opinion that this attempt is one which never could touch that. In the first place, it is not a competing paper, and there arises a broad distinction between this case and almost all the others which have been cited to us. A person would not buy the Morning Post the less because he buys the Evening Post. When, if at all, is it to be suggested that the injury will be done to the Morning Post? Is it at the moment the Evening Post is bought, or is it afterwards? We asked the learned counsel who argued the case for the Morning Post how he suggested that a person who bought the Evening Post in the evening would be less likely to buy the Morning Post in the morning. The counsel was then driven to this ingenious suggestion, that a person going by rail-

way might wish to buy his Morning Post over night. I cannot imagine a gentleman buying the Morning Post over night. Moreover, if you could do so, you would not want to do so. It is as unlikely as if you were to wish to have your breakfast over night. The only case in which I can conceive a person wanting his breakfast over night is when he was not likely to have it next morning; and, therefore, if a person were not likely to be able to purchase a Morning Post the next day, it is possible he might purchase the Evening Post the night before. But the hypothesis is that in such a case he would not be able to buy the Morning Post next morning, and, if so, where is the injury? It is too remote and fanciful to suppose that anything of that sort will happen. In the next place, is a person who reads the paper likely to be deceived? He must be an extremely unintelligent person if he thinks that the Evening Post, which disclaims all connection with the Morning Post, and writes upon different topics and in a different style, is connected with the Morning Post. The idea would explode itself before he got half way through the first page. I think the Morning Post is not likely to be hurt. Still I think a trick has been attempted by the new paper, and for that reason I think the justice of the case is sufficiently met by dismissing the action without costs, because no damage has been shewn as likely to accrue to the Morning Post—dismissing it without costs, as the persons against whom the action has been brought have been, in my opinion, guilty of a dishonest action.

AUNT JEMIMA MILLS CO. v. RIGNEY & CO.

(Circuit Court of Appeals of the United States, 1917. 247 Fed. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039.)

Bill by the Aunt Jemima Mills Company against Rigney & Co. From a decree (234 Fed. 804) dismissing the bill, complainant appeals.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is an appeal from a decree of the United States District Court for the Eastern District of New York dismissing the complainant's bill for infringement of trade-mark and for unfair competition on the ground that the goods manufactured by the parties respectively are different, viz. self-rising flour, by the complainant and pancake syrup by the defendants.

The Davis Milling Company, of St. Joseph, Mo., originated the trade-mark, which consists of the words "Aunt Jemima's," accompanying the picture of a negress laughing, in 1899, as we infer from the statement and declaration accompanying the registered trade-mark taken out in the United States Patent Office April 3, 1906, for self-rising flour. February 1, 1914, the Milling Company sold out its business, trade-marks, and good will to the Aunt Jemima Mills Company, the complainant in this case.

Since February 15, 1908, Rigney & Co., the defendants, have used a trade-mark precisely like the complainant's, which was registered December 29, 1908, in the Patent Office on an application filed March 6, 1908, for certain syrups and sugar creams.¹⁴

We find no case entirely like the present. In *Hanover Star Milling Co. v. Allen & Weeks*, 208 Fed. 513, 125 C. C. A. 515; L. R. A. 1916D, 136, affirmed *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, which was also said by Mr. Justice Pitney to be a most unusual case, it was held that a trade-mark is not a subject of property, and that even a technical trade-mark like the one under consideration will be protected only in markets where it has been established; that is, where it has come to indicate the origin or ownership of the goods it marks. In that case the trade-mark was adopted without any knowledge whatever of the prior use. The right to a trade-mark, though strictly appurtenant to the trade, becomes a property right as soon as it identifies the trade. When it gets this far, it is a mere question of words whether we say that the trade or the trade-mark is protected. Mr. Justice Pitney, in affirming this judgment, recognized an exception when he said:

"In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appears that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant's reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against an injunction, unless they get it from a consideration now to be examined.

It is said that even a technical trade-mark may be appropriated by any one in any market for goods not in competition with those of the prior user. This was the view of the court below in saying that no one wanting syrup could possibly be made to take flour. But we think that goods, though different, may be so related as to fall within the mischief which equity should prevent. Syrup and flour are both food products, and food products commonly used together. Obviously the public, or a large part of it, seeing this trade-mark on a syrup, would

¹⁴ A discussion of the question of acquiescence in the defendant's conduct is omitted, as is the opinion of Learned Hand, J., dissenting on this question.

conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These we think are property rights which should be protected in equity. We have held in *Florence v. Dowd*, 178 Fed. 73, 101 C. C. A. 565, that a manufacturer of hair brushes under the trade-mark "Keepclean," who did not make toothbrushes, is entitled to be protected against the unfair competition of one who manufactures toothbrushes under the trade-mark "Sta Kleen." So in *Collins Co. v. Oliver Ames Co.* (C. C.) 18 Fed. 561, a manufacturer of metal articles, which had never made shovels, was granted an injunction preventing the defendant from putting the complainant's trade-mark on its shovels.

The defendants are a partnership, and did not incorporate the words "Aunt Jemima's" into their firm name; but the complainant seems to think that appropriation of a trade-mark is to be treated in exactly the same way as appropriation of a trade-name. The latter is a trespass of the same nature as is committed by one who applies another man's name to his own goods. This is a wrong which equity will enjoin without reference to the character of the article, or to the question of competition or of prior occupation of the market in any particular territory. No one has a right to apply another's name to his own goods. If, for instance, one were to publish a book on banking under the name of a firm of bankers, it would be no answer to say that there was no competition between banking and publishing, or that the bankers had sustained no pecuniary damage, or that the book was a good book. The act would still be a trespass, for which the bankers would be entitled to at least nominal damages at law, and, that remedy being inadequate and the trespass being a continuing one, they would be entitled to relief in equity. Such is our decision in *British American Tobacco Co. v. British American Cigar Stores Co.*, 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915B, 363, in which a company engaged solely in the wholesale tobacco business was protected against the use of a similar corporate name by a retailer of cigars, although there was no competition between them.

There are many decisions of the English courts to the same effect. In *Eastman Company v. Kodak Cycle Co.*, 15 Reports Patent Cases, 105,¹⁵ the complainant was a manufacturer of cameras under the name Kodak. Defendant, under the name "Kodak Cycle Company," began the manufacture of bicycles, calling them "Kodak" cycles, and registered the name as a trade-mark for bicycles and other vehicles. The Eastman Company brought suit to restrain the use of the word "Kodak" and to rectify the register. The motion for injunction and the motion to rectify the register came on to be heard together. The mo-

¹⁵ A quotation from the opinion in this case is omitted.

tion to rectify was sustained, and the defendant's mark expunged, and an injunction was granted.

Dunlop Pneumatic Tyre Co. v. Dunlop Lubricant Co., 16 Reports Patent Cases, 12: In 1888 the word "Dunlop" was first used by complainant's predecessors to designate goods manufactured by them. Complainant made bicycle tires, rims, pumps, etc. One Funt started in business as the "Dunlop Lubricant Co.," and dealt in oils and lubricants for bicycles, which he sold in packages bearing the word "Dunlop" in large letters. Complainant had never dealt in oils or lubricants. Held, that the use of the word "Dunlop" by defendant was deceptive, and it was enjoined.

In Valentine Meat Juice Co. v. Valentine Extract Co., 17 Reports Patent Cases, 673, the complainant used the word "Valentine" upon liquid meat extracts for medicine. Defendant used the word "Valentine" on beef extract used for food. An injunction was granted.

Dunlop Pneumatic Tyre Co. v. Dunlop-Truffault Cycle & Tube Manufacturing Co., 12 Times Law Reports, 434: This was a motion for a preliminary injunction to restrain the defendant from using the name "Dunlop" as a part of its corporate style. Complainant was the manufacturer of pneumatic tires, defendant the manufacturer of bicycles and steel tubes used in the manufacture of bicycles. An injunction was granted. Mr. Justice Chitty holding that the name "Dunlop" had been chosen by the defendants to create confusion in the minds of the public and make them think that the defendant company was connected with that of the plaintiffs.

Premier Cycle Company v. Premier Tube Company, 12 Times Law Reports, 481: This was a motion for a preliminary injunction to restrain the defendants from using the word "Premier" as a part of their business style. Complainant was a manufacturer of bicycles and tubes used in their construction. The defendants stated that they were tube manufacturers and had no intention of competing with the complainant in the making of bicycles. An injunction was granted.

We do not think these authorities apply to the appropriation of a trade-mark.

As the defendants' conduct was wrongful, the complainant is entitled to an injunction, notwithstanding the delay of some eight years in asserting its rights (*McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828), but is not entitled to an accounting for damages and profits.

The decree is reversed.

OGILVIE v. G. & C. MERRIAM CO.

(Circuit Court of the United States, 1907. 149 Fed. 858.)

Court, Circuit Judge. This bill and cross-bill present two general questions: Has the defendant, the G. & C. Merriam Company, the exclusive right to the use of the name "Webster" in the title of dictionaries of the English language? and, second, has the complainant,

George W. Ogilvie, unmistakably informed the public that his dictionary is a Webster's dictionary published by George W. Ogilvie, and not a Webster's dictionary published by the G. & C. Merriam Company?¹⁶

The dictionary published by Ogilvie is entitled "Webster's Imperial Dictionary," and he seeks by his bill to enjoin the Merriam Company from sending out threatening letters and circulars to the trade, to the effect that the Merriam Company has the exclusive right to the use of the name "Webster" upon dictionaries. On the other hand, the Merriam Company, by its cross-bill, seeks to enjoin Ogilvie from the use of the name "Webster" upon his dictionary, and from sending out misleading circulars and advertisements respecting his dictionary. It is claimed by the Merriam Company that this use of the name Webster and these circulars and advertisements are an infringement of Webster's International Dictionary, which is the latest edition of Webster's Dictionary published by the Merriam Company.

The evidence shows that the Ogilvie dictionary is an enlarged and revised edition of Webster's Dictionary, based upon Webster's Unabridged Dictionary, which was published and copyrighted by G. & C. Merriam in 1847, and upon which the copyright expired in 1889. The evidence also shows that the Merriam Company, and its predecessors in title, G. & C. Merriam & Co., and G. & C. Merriam, have been the publishers of Webster's Dictionaries for more than 50 years, having acquired all the rights in Webster's Dictionary from the heirs of Noah Webster previous to 1847, and that since that time they have published numerous editions of this work.

It further appears from the evidence that on the back or cover of every copy of each edition of this book published by Noah Webster and by the Merriams, beginning with the year 1806, have appeared the words "Webster's Dictionary," and that this is the generic name by which this book has always been known and described.

It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's Dictionaries, and that in 1889 the name "Webster," as applied to dictionaries, had acquired a secondary meaning, and indicated to the public the dictionaries published and sold by the Merriam Company. It further appears that, since the expiration of the Merriam copyright in Webster's Unabridged Dictionary in 1889, various editions of Webster's Dictionary have been published and sold by other publishers; but, notwithstanding this circumstance, it is shown by a preponderance of evidence that the name "Webster" still indicates to the public the dictionaries published and sold by the Merriam Company.

We have, then, to inquire what are the rights of Ogilvie with respect to the use of the name "Webster" upon dictionaries after the expiration of the Merriam copyright in 1889; it appearing that the name "Web-

¹⁶ So much of the case as relates to the second question is omitted.

ster" has a two-fold signification, in that it is the generic name of the dictionary, and also indicates to the public the dictionaries published and sold by the Merriam Company.

A copyright, the same as a patent, is a monopoly created by statute. This monopoly is granted upon the implied condition that at the expiration of the copyright the book and the name by which it is designated are dedicated to the public; in other words, at the expiration of the copyright, both the book and its generic name become public property. To say that the public have the right to publish the book, and not the incidental right to use the name by which it is known, is in effect to destroy the public right, and to perpetuate the monopoly. For instance, to hold that the Merriam Company, after the expiration of its copyright in Webster's Unabridged Dictionary, still has the exclusive right to the use of the name "Webster" on some theory of trade-mark or trade-name, or unfair competition, would be to nullify the public dedication, and perpetuate the monopoly secured by the copyright. It follows, therefore, as a necessary result, that at the expiration of the copyright any person has the right to publish the copyrighted book, and to call it by its generic name.

But it may so happen, as in the case at bar, that, at the expiration of the copyright, the name by which the book is known has also acquired a secondary meaning, and has come to indicate to the public the book published and sold by the publisher who took out the copyright. In such a case another person must so use the name as to protect individual property rights, and to prevent injury to the public. While no restrictions can be imposed upon the right to use the name, such person must, so far as is consistent with such use, protect the good will and business of the original publisher, and guard the public against deception. The duty, therefore, is imposed upon such person of accompanying his publication with such indications as to the source of publication as will unmistakably inform the public that the book is published by himself, and not by the original publisher. After having taken these precautions, if any injury results to the business of the original publisher, it is *damnum absque injuria*. Such injury is analogous to the incidental injury to the business of another which may result from the absolute right of every one to use his own name in his own business.

It follows in the case at bar that Ogilvie, upon the expiration of the Merriam copyright, has the right to publish the copyrighted book, or a revised edition thereof, and to call it "Webster's Dictionary," or "Webster's Imperial Dictionary," provided that he clearly indicates to the public that it is a Webster's Dictionary published by him, and not a Webster's Dictionary published by the Merriam Company.

BENDER v. ENTERPRISE MFG. CO.

(Circuit Court of Appeals of the United States, 1907. 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. [N. S.] 448, 13 Ann. Cas. 649.)

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 148 Fed. 313.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a decree enjoining the defendant from making and selling repair parts for the Enterprise meat chopper, without marking on each the name of the maker. The case was heard on an agreed statement of facts. It appears that the complainant below, the Enterprise Manufacturing Company, had been making and selling meat choppers for many years. It and its predecessor used as a trade-mark for its choppers, and other like hardware, the word "Enterprise." The meat choppers it makes at present have been manufactured since 1883. Since 1891, it has been making what is called the "Enterprise Tin Meat Choppers," and since 1892 that name has been registered as a trade-mark. The original Enterprise Meat Chopper was patented in 1883 and 1886. The patents have long since run out. Since 1887 and 1888, many of the repair parts of the Enterprise chopper have been marked as made by that company. It appears that for many years there has been a large independent trade in the repair parts of meat choppers, and that the defendant below has made and sold many thousand sets of such repair parts. These sets are packed in boxes which are labeled: "Repair parts for the Enterprise Meat Chopper, manufactured by the Giant Lock Company, Cleveland, Ohio."

The court below held in its decree that as matter of fact the complainant had for many years used the name "Enterprise" as a trade-mark to distinguish its meat chopper from others on the market, and that it was well known to the trade and consumers as the complainant's product; that the wearing parts of the machine had for many years been sold by the complainant independent of the machine, and that the complainant had an established good will in the business of making and selling such parts; that the defendant had made and sold wearing parts intended for the Enterprise chopper, and such parts were the same shape and appearance as those of the complainant, but were without any markings to indicate the maker, and that, while put up in packages labeled as claimed by the defendant, they reached the consumer without any markings to indicate their origin, and, by reason of this absence, purchasers of the defendant's wearing parts were misled into believing that they were made by the complainant, the well-known maker of the machines. Evidently, as a result of these findings, which virtually decide the case, the court decreed that the defendant be enjoined from making or selling any meat chopper parts not made by the complainant, without distinguishing such parts from

similar parts made by complainant, by clearly marking upon each of said parts its own name or the name of the makers.

In its opinion the court refers to three cases: *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, in which the defendant was enjoined from selling a zither of the peculiar shape of the complainant's without marking it as his own manufacture; *Deering Harvesting Co. v. Whitman & Barnes*, 91 Fed. 376, 33 C. C. A. 558, in which it appears that the parts of which complainant sought to enjoin the making and sale were plainly advertised by catalogue and labeled as the complainant's manufacture; and *Neostyle Mfg. Co. v. Ellam's Duplicator Co.*, 21 R. P. C. 185, in which the court suggested it was the duty of the defendant to mark an ink sold for use in a duplicating machine as its own product, so as to distinguish it from that made by the manufacturers of the machine. The cases referred to by the court are, for the purposes he uses them, in line with the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, in which it was held that while any one, after the expiration of the Singer patents, was free to make and sell the Singer sewing machine under that name, it must mark the machine with the name of the maker, so that the public might not be misled into thinking it was the product of the original patentees. The decision below apparently extends the doctrine of this case so as to require not merely the machine, when made by others than the original patentees, but the repair parts of the machine, to be marked with the name of the maker.

We think this is going too far, and that the resulting limitation upon the rights of the public is unjustified and therefore unreasonable. The cases themselves may be distinguished. In *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, the zither was of a unique shape. The defendant purposely and wrongfully imitated its shape. The court held he had not the right to do this "to steal the good will attaching to the plaintiff's personality," and, to prevent it, required the defendant's zithers to be clearly marked so as to indicate they were the defendant's, and not the plaintiff's, goods. But in the present case no such attempt was shown. There was no effort to palm off the repair parts of the defendant below as those of the complainant. In the case of *Deering Harvester Co. v. Whitman & Barnes Co.*, 91 Fed. 376, 33 C. C. A. 558, it does not appear that the repair parts were marked as made by the defendant. They were advertised by catalogue and labeled as of their manufacture, but that was just what was done in the present case. In the *Deering Harvester Case*, the parts themselves were marked by certain letters showing where each belonged in the machine. This was quite a different thing, and unnecessary in the present case. In the English Case, *Neostyle Mfg. Co. v. Ellam's Duplicator Co.*, 21 R. P. C. 185, there was an attempt to restrain the defendant from selling ink or paper for use on the Neostyle machine. This was defeated; the judgment being for the

defendant. Having thus decided the case, the court suggested that they put their names on future tins of ink and this was accepted.

There was no actual deception charged in this case, nor any attempt at proof of any made. The only unfair trade was inferential or constructive. The present case goes on the assumption that unmarked repair parts are to be taken as made by the makers of the machine, the original patentees, and this although the makers marked their repair parts. We think a safer assumption would be, in view of the established trade in repair parts, that unmarked repair parts are to be taken as not made by the makers of the machine or original patentees, but by others. It is not to be inferred that they are made by the makers of the machine, unless so marked. The mere making and sale of repair parts for a well-known machine by other than the makers would therefore not be regarded as an act of unfair trade, unless they were put out as the goods of the original patentee. The patents having long since expired, the manufacture of meat choppers and all their parts are now open to all. To require every repair part, however small, to be branded with the name of the maker, would tend, it seems to us, to stifle competition in the manufacture and sale of repair parts, and put an unnecessary burden upon a large and important branch of trade.

The decree of the lower court is reversed.

LINOLEUM MFG. CO. v. NAIRN.

(High Court of Justice, 1878. L. R. 7 Ch. Div. 834.)

This was an action to restrain the use of the word "Linoleum" as applied to floor-cloth.

A Mr. Walton obtained several patents, the last and principal being in 1863 for preparing floor-cloth by means of a certain solidified or oxidised oil, to which he gave the name "Linoleum," and the floor-cloth made by him therewith had been called and known as "Linoleum Floor-Cloth" and apparently also as "Linoleum." The word "Linoleum" had not been previously used, and was a fancy name invented by Mr. Walton, and the substance itself appeared to have been new. In 1864 the Linoleum Manufacturing Company, the plaintiffs in this action, was formed, and took assignments of Mr. Walton's patents and rights. The floor-cloth made by the company had been extensively used, and no one else had hitherto made or sold Linoleum, or Linoleum Floor-Cloth. The patent of 1863 had now expired, and the defendants R. Nairn and M. B. Nairn, who were floor-cloth manufacturers, proposed to make and sell Linoleum Floor-Cloth, calling it by that name. This action was brought to restrain them. The details of the case are sufficiently stated in the judgment of his Lordship.

FRY, J. [His Lordship stated the facts as to the patents, and observed that down to the present time nobody else had made and sold either "Linoleum" or floor-cloth made of "Linoleum." But it appeared that the sole manufacture by Mr. Walton and those claiming under him was due entirely, or to a large extent, to the existence of the numerous patents, the effect of which was to give Mr. Walton and those who claimed under him a monopoly in the manufacture and sale of this Linoleum Floor-Cloth. It was therefore not surprising that the name by which Mr. Walton designated the compound had been applied exclusively to the manufacture of Mr. Walton and those who claimed under him. The case of the plaintiffs was that they had a trade-mark, and that the essential or one of the essential and material terms of that trade-mark was the word "Linoleum," and that this had been taken by the defendants. His Lordship then described the trade-marks, and expressed his opinion that "F. Walton's Patent" was the most conspicuous part of the trade-mark used by the plaintiffs, and that the word "Linoleum" appeared to be used only as descriptive, and was not an essential part of the trade-mark; and that the defendants' trade-mark contained their own name much more conspicuously than the word "Linoleum," and was quite dissimilar from the plaintiffs' trade-mark. His Lordship then continued:]

But it has been argued that this case comes within the second class of cases to which the Master of the Rolls referred in *Singer Manufacturing Company v. Wilson*, 2 Ch. D. 443, and that the word "Linoleum," from the user which had been made of it, must mean the goods manufactured by the plaintiffs, and that therefore to take the word "Linoleum" and use it was to assert that the goods so sold and made were made by the plaintiffs, and that any user of the word "Linoleum" was a fraud not in a moral point of view, but in the point of contemplation of this court. The argument is that there was a misrepresentation, the misrepresentation consisting in alleging by the use of the word "Linoleum" that the goods were made by the plaintiffs, when in fact they were made by the defendants. It will be observed that the inquiry with regard to the use of the word "Linoleum" as a constituent element in the trade-mark, and the inquiry as to the use of the word "Linoleum" as a misrepresentation are one and the same inquiry, and I must consider what the word "Linoleum" meant as used at the time when the defendants intended to attribute it to their manufacture.

In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, namely, the solidified or oxidised oil, he gave to it the name of "Linoleum," and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no an-

swer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if "Linoleum" means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears.

But then it is said that, although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs were the only makers of this substance, would, in using the word, know he was speaking of a substance made by the plaintiffs. But, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has the meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another.

Those are the observations which have occurred to me upon a mere statement of the plaintiffs' case, and how are they confirmed or shaken by the evidence in the case? [His Lordship then referred to the articles of association, the advertisements, and the patents taken out by the company, as shewing that they used the word "Linoleum" merely as descriptive of the substance, and looked on the words "F. Walton's Patent" as the essential part of their trade-mark. His Lordship then continued:] I come, therefore, to the conclusion upon the facts as they are presented to me, and notwithstanding the evidence to which my attention has been drawn on the part of the plaintiffs, that the word "Linoleum" did bear that meaning which Mr. Walton put upon it, namely, solidified or oxidised oil; that solidified or oxidised oil may be made by the defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to do. If I found they were attempting to use that name in connection with other parts of a trade-mark, so as to make it appear that the oxidised oil made by the defendants was made by the plaintiffs, of course the case would be entirely different.

Then what are the authorities to which my attention has been called upon this part of the case? That which is most near to the present case is *Braham v. Bustard*, 1 H. & M. 447. In that case the plaintiffs had invented a white soft soap, which the court found to be a new

article of commerce. Having so invented it, they were minded to describe it in a manner which should distinguish their manufacture, and they gave to it an additional name, calling it "Excelsior White Soft Soap." There the word "Excelsior," having no relation to the subject-matter, and being a purely fancy name, was held by the Vice Chancellor to be intended to discriminate one particular species of soft soap, and accordingly the word "Excelsior" was protected. Now here, as I pointed out, the plaintiffs having invented, or their predecessors in title having invented, a new subject-matter, use merely the name distinguishing that subject-matter, but do not use a name distinguishing that subject-matter as made by them from the same subject-matter as made by other persons. The two cases are essentially different. It appears to me, therefore, that there has been neither infringement of any essential part of the plaintiffs' trade-mark nor any attempt on the part of the defendants to represent the goods which they intended to sell as goods made by the plaintiffs.

The plaintiffs' case has therefore, in my judgment, failed, and dismiss the action with costs.

COCA-COLA CO. v. KOKE CO.

(Supreme Court of the United States, 1920. 254 U. S. 143, 41 Sup. Ct. 113, 65 L. Ed. 189.)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the Coca-Cola Company to prevent the infringement of its trade-mark Coca-Cola and unfair competition with it in its business of making and selling the beverage for which the trade-mark is used. The District Court gave the plaintiff a decree. 235 Fed. 408. This was reversed by the Circuit Court of Appeals. *Koke Co. v. Coca-Cola Co.*, 255 Fed. 894, 167 C. C. A. 214. Subsequently a writ of certiorari was granted by this Court. 250 U. S. 637, 39 Sup. Ct. 493, 63 L. Ed. 1183.

It appears that after the plaintiff's predecessors in title had used the mark for some years it was registered under the Act of Congress of March 3, 1881 (21 Stat. 502), and again under the Act of February 20, 1905, c. 592, 33 Stat. 724 (Comp. St. § 9485 et seq.). Both the courts below agree that subject to the one question to be considered the plaintiff has a right to equitable relief. Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone. It is found that defendant's mixture is made and sold in imitation of the plaintiff's and that the word "Koke" was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods. The only obstacle found by the Circuit Court of Appeals in the way of continuing the injunction granted below was its opinion that the trade-mark in itself and the advertisements accompanying it made such fraudulent repre-

sentations to the public that the plaintiff had lost its claim to any help from the court. That is the question upon which the writ of certiorari was granted and the main one that we shall discuss.

Of course a man is not to be protected in the use of a device the very purpose and effect of which is to swindle the public. But the defects of a plaintiff do not offer a very broad ground for allowing another to swindle him. The defence relied on here should be scrutinized with a critical eye. The main point is this: Before 1900 the beginning of the good will was more or less helped by the presence of cocaine, a drug that, like alcohol or caffeine or opium, may be described as a deadly poison or as a valuable item of the pharmacopœia according to the rhetorical purposes in view. The amount seems to have been very small, but it may have been enough to begin a bad habit and after the Food and Drug Act of June 30, 1906, c. 3915 (Comp. St. §§ 8717-8728), if not earlier, long before this suit was brought, it was eliminated from the plaintiff's compound. Coca leaves still are used, to be sure, but after they have been subjected to a drastic process that removes from them every characteristic substance except a little tannin and still less chlorophyll. The cola nut, at best, on its side furnishes but a small portion of the caffeine, which now is the only element that has appreciable effect. That comes mainly from other sources. It is argued that the continued use of the name imports a representation that has ceased to be true and that the representation is reinforced by a picture of coca leaves and cola nuts upon the label and by advertisements, which however were many years before this suit was brought, that the drink is an "ideal nerve tonic and stimulant," etc., and that thus the very thing sought to be protected is used as a fraud.

The argument does not satisfy us. We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words "Coca-Cola" probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in *United States v. Coca-Cola Co.*, 241 U. S. 265, 289, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled. The coca leaves and whatever of cola nut is employed may be used to justify the continuance of the name or they may affect the flavor as the plaintiff

contends, but before this suit was brought the plaintiff had advertised to the public that it must not expect and would not find cocaine, and had eliminated everything tending to suggest cocaine effects except the name and the picture of the leaves and nuts, which probably conveyed little or nothing to most who saw it. It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication. The plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time.

The decree of the District Court restrains the defendant from using the word "Dope." The plaintiff illustrated in a very striking way the fact that the word is one of the most featureless known even to the language of those who are incapable of discriminating speech. In some places it would be used to call for Coca-Cola. It equally would have been used to call for anything else having about it a faint aureole of poison. It does not suggest Coca-Cola by similarity and whatever objections there may be to its use, objections which the plaintiff equally makes to its application to Coca-Cola, we see no ground on which the plaintiff can claim a personal right to exclude the defendant from using it.

The product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present. The injunction should be modified also in this respect.

Decree reversed.

Decree of District Court modified and affirmed.

HUMPHREYS HOMEOPATHIC MEDICINE CO. v. BELL.

(Common Pleas of New York City and County, 1888. 15 Daly, 6, 2 N. Y. Supp. 50.)

Appeal from Equity Term.

This is an action brought by the Humphreys Homeopathic Medical Company against Beatson J. Bell et al. to restrain the latter from preparing and packing their medicines for market so as to resemble plaintiff's, and to restrain defendant Bell from advertising himself as late manager of plaintiff. Judgment for plaintiff. Defendants appeal.

LARREMORE, C. J. The learned judge who tried this case at the equity term, in his opinion there rendered, has carefully considered both of the important points involved. These are: First, the question of the similarity between the plaintiff's and defendants' boxes of veterinary specifics, and the alleged imitation of plaintiff's medical preparations by the defendants; and, second, the matter of the defendant B. J. Bell's describing himself habitually, in his business advertise-

ments, as the "late manager of Humphreys Specific Medicine Company."

With regard to the first of these subjects of controversy, we think that the cases cited by Judge Daly establish the general principle that, outside of the question of the infringement of a specific trade-mark, there is a proprietary right which may be asserted in a court, and protected from violation by an injunction, if necessary, in any original and peculiar method or form of preparing, wrapping, boxing, and packing articles of merchandise, which, as matter of fact, has been invented and first employed by the plaintiff, and has not been in common use by the public. In the case of *Woollam v. Ratcliff*, 1 Hem. & M. 259, cited by Judge Daly, it was held that, in regard to the packing of merchandise in "a bundle similar to that of complainant's, the wrong does not lie in the resemblance in any one particular, but in the accumulation of resemblances." The grounds for an injunction in such a case are, as in trade-mark cases, twofold, to wit: First, that of protection to the plaintiff in his exclusive right; and, second, that of the protection of the public from imposition by the palming off of goods different from or inferior to those usually furnished by the plaintiff. The learned judge at special term, after a careful review of the evidence, and an actual inspection of the cases of medicine, and the contents thereof, furnished by the plaintiff and the defendants, respectively, has reached the conclusion that one is a close and intentional imitation of the other; and that, by reason of the similarity between the boxes externally, "the arrangement and number of the bottles of ointment, medicator, pamphlet, and labels on the bottles, and inside the cover of the box," there is danger that the public will be misled, and that persons intending to purchase the plaintiff's preparations may be induced to purchase the defendants' instead. We see no reason to question or disturb this finding of fact. It is one which, in the nature of things, must depend largely on an ocular examination of the original article and its alleged infringement, and the printed evidence in the case is sufficient and ample to sustain the judge's finding.

We also concur with the learned judge's disposition of the second question above referred to. A large part of the evidence offered by the defendants tended to show that the defendant Beatson J. Bell had actually been the manager of the plaintiff corporation, or its predecessor of a similar name, and that, therefore, he was justified in describing himself as such manager in his subsequent business operations. But such evidence, even if taken as true, would not establish anything further than that said defendant had been the business manager of such corporation. The testimony shows that said defendant while in the employ of plaintiff had to do with book-keeping, general management of finances, engagement and discharge and direction of traveling salesmen and other employés, and attending to the corporation's advertising. The business and financial department of such a corpo-

ration as the plaintiff, while, of course, important, is necessarily not its most essential branch; it is rather an adjunct to the main purpose of its formation. It does not appear that said defendant had anything to do with the management of the laboratory, or the preparation of any of the remedies or medicine prepared by the Humphreys Homeopathic Medicine Company. For this reason it is not a truthful statement for Mr. Bell to describe himself as "late manager of the Humphreys Specific Medicine Company." As Judge Daly remarks in his opinion: "But with that branch of the business on which alone the reputation of the company depended, the compounding of medicines and putting up of specifics, he had no concern whatever, as Dr. Humphreys, the president of the company and the originator of the system of specifics, had exclusive charge of it." A decision of Judge Dugro at the special term of the superior court (Colton v. Deane, Daily Reg. Feb. 14, 1887) is in point in the present discussion. That was an action brought for an injunction against a woman who described herself, in business advertisements, as, "Colton's late assistant." It seems that the duties actually performed by said woman were not the assisting of the dentists in extracting teeth, but only in the administration of gas under instructions from the operator; and the plaintiff therein testified that this service could be performed by any child after an experience of a couple of weeks. The learned judge remarked: "Colton's business consisted in extracting teeth with the aid of gas. The extraction of teeth was the main work. This required a dentist, and for this work he had several dentists in his employ. The work of Miss Wolfsbruck was such as required very slight experience, for it seems the menial servant sometimes did it. Colton's business establishment was well known throughout the community, as a place where teeth would be painlessly extracted. And, by holding herself forth to the public as 'Colton's late assistant,' Miss Wolfsbruck was impliedly claiming that she had assisted at said establishment in the extraction of teeth, while such was not in fact her duty in said place." This case in the superior court was closely analogous in principle to the case at bar, and I concur with the views of the learned judge there expressed. There, as in the present case, a permanent injunction was granted against the use of the false designation or description.

The judgment appealed from should be affirmed, with costs.

SECTION 2.—HIS TRADE INFORMATION

PEABODY v. NORFOLK.

(Supreme Judicial Court of Massachusetts, 1868. 98 Mass. 452, 96 Am. Dec. 664.)

Bill in equity, filed January 5, 1867, by Francis Peabody, the testator of the present plaintiffs, against John R. Norfolk only, and subsequently amended by a supplemental bill so as to include James P. Cook as a defendant.

The bill set forth that, for many years prior to the filing of the same, Peabody was secretly engaged in making experiments, inventing and adapting machinery, and originating and perfecting a process, to manufacture gunny cloth from jute butts, and at last succeeded in perfecting machinery and a process to do so profitably, such a manufacture having never before been attempted, so far as he knew; that thereupon he built a large factory on Bridge street in Salem to carry on such manufacture with such machinery and process, and filled it with such machinery, and invested a large sum in the building, and the machines, material and business; that, both in all his experiments, and in the construction of the machines for the factory and the setting up and running of the same, he employed Norfolk, who was a machinist, to give his whole time and skill for a salary; that, in the course of his employment, Norfolk became confidentially possessed of knowledge of the machinery and process, well understanding that such knowledge was to be kept wholly secret; and that, at the solicitation of Norfolk while so employed, Peabody made a written agreement with him, dated June 24, 1865, which was annexed in full to the bill, and the material parts whereof were as follows:

"Said Norfolk agrees to serve the said Peabody as the engineer of his jute factory in Bridge street so far as he is required to do so by said Peabody, and particularly for that part which relates to the running and construction of the engines and boilers, and of the machinery used in the manufacture of the goods, also in the construction and repairs of the buildings that are required," and "agrees that he will not give any parties information, directly or indirectly, in regard to the machinery, or any portions of it," which had been used in the experiments, or should be used in the factory, but "will consider all of said machinery as sacred to be used only for the benefit of said Peabody or his assigns, and that by all the means in his power he will prevent other persons from obtaining any information in regard to it such as would enable them to use it.

"Said Peabody on his part agrees to pay the said Norfolk the sum of one thousand dollars annually in monthly instalments of eighty-three dollars and thirty-three cents each, to be received in full compen-

sation for above described services, provided the said Norfolk shall render his services acceptable to said Peabody as he has heretofore done, and that said Peabody or his assigns or agents shall continue the business of manufacturing jute goods in said mill in Bridge street or elsewhere."

The bill further alleged that, on January 1, 1867, Norfolk left his said employment, and had made arrangements with persons unknown to Peabody to build another factory for the manufacture of gunny cloth from jute butts, and to furnish these persons with machinery to be built on the models of the machinery of Peabody, and impart to them Peabody's secret process of manufacturing, and aid and assist them in manufacturing by that process, and that he had taken from the possession of Peabody the original drawings, or copies thereof, of said machinery, and intended to use them in carrying out his said arrangements.

The prayer of the bill was for an injunction to restrain Norfolk from carrying out any such arrangements, or communicating to any person any knowledge of said machinery and process derived by him in the course of his said confidential employment; and to oblige him to return to Peabody said drawings or copies. Upon this bill an injunction was issued in conformity with its prayer.

On June 8, 1867, Peabody filed a supplemental bill, reciting said prayer and the issue of the injunction, and alleging that he had learned for the first time, since the service of the injunction on Norfolk, that James P. Cook was one of the persons with whom Norfolk had made his said arrangements, and further, that Cook and his associates, knowing the relations between Peabody and Norfolk, and knowing the fact of the injunction, were nevertheless proceeding to build machinery to manufacture gunny cloth from jute butts by Peabody's secret process; that Cook was pretending to build the machinery in his own name, upon information, models and drawings obtained from Norfolk before or about the time of the service of the injunction, but that, in fact, long before he ever made any arrangements with Norfolk on the subject, he had notice of all Peabody's relations with and claims on Norfolk; and that, although Norfolk was falsely pretending to obey the injunction, yet in fact he was one of Cook's present associates in the building of such machinery.

The prayer was for an injunction on Cook similar to that issued against Norfolk.

To this supplemental bill Cook filed a general demurrer; and the questions arising thereon were reserved by Foster, J., for determination by the full court.

GRAY, J. It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as prop-

erty. If he adopts and publicly uses a trade mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and thus affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.

In the earliest reported case of this class, Lord Eldon indeed refused to grant an injunction against imparting, in violation of an agreement, the secret, not only of a patent which had been obtained and had expired, and which the whole public was therefore entitled to use; but also that of making a certain kind of pills, for which no patent had been procured; and stated, as a reason for the latter, that, if the art and method of preparing them was a secret, the court could not, without having it disclosed, ascertain whether it had been infringed. *Newbery v. James*, 2 Meriv. 446. But the same learned chancellor afterwards considered the general question as still an open one, whether a court of equity would restrain a party from divulging a secret in medicine, which was not protected by patent, but which he had promised to keep; and in such a case dissolved an injunction of the vice chancellor, upon the sole ground that the defendant made affidavit that the secret was not derived from the plaintiff. *Williams v. Williams*, 3 Meriv. 157. And in a later case he unhesitatingly granted an injunction against one who by the terms of his agreement with the plaintiff was not to be instructed in the secret, and who had obtained a knowledge of it by a breach of trust. *Yovatt v. Winyard*, 1 Jac. & Walk. 394.

Sir John Leach decreed, in one case, specific performance of an agreement by a trader to sell the good will of a business and the exclusive use of a secret in dyeing; and, in another, an account of the profits of a secret for making a medicine against a son of the inventor, holding it in trust for his brothers and sisters. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Green v. Folgham*, *Ib.* 398.

In a more recent case, Morison, the inventor and sole proprietor of a medicine, for which no patent had been obtained, entered into partnership with Moat, to whom he communicated the secret of making the medicine, but did not make the secret a part of the assets of the part-

nership, and reserved it to himself as against all other persons, and Moat covenanted not to reveal it to any person whomsoever; by subsequent agreement Morison's sons and a son of Moat were admitted as partners in the business; and the secret was surreptitiously obtained from Moat by his son. After the death of both the original parties, on a bill brought by Morison's sons, who were also legatees of the secret, against Moat's son, Vice Chancellor Turner, in an elaborate judgment reviewing all the English authorities, granted an injunction restraining the defendant from using the secret in any manner in compounding the medicine, and refused to restrain him from communicating the secret, simply for want of any allegation or evidence of an intention to communicate it. *Morison v. Moat*, 9 Hare, 241. The defendant appealed; but the order was affirmed; and Lord Cranworth, delivering the opinion of the Court of Appeal, said: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer." 21 L. J. (N. S.) Ch. 248.

Mr. Justice Story states the doctrine in the broadest terms, that "courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interest." 2 Story, Eq. § 952. In this court, it is settled that a secret art is a legal subject of property, and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person. *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373, 374, 90 Am. Dec. 203. In *Jarvis v. Peck*, 10 Paige (N. Y.) 118, such a bond was held valid in equity. And by the Gen. Sts. c. 113, § 2, this court has not only jurisdiction in equity of suits for enforcing and regulating the execution of trusts, or for the specific performance of written contracts by and against either party and his representatives and assigns, but also full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law.

The contract between Peabody and Norfolk was, on the part of Norfolk, to serve Peabody as engineer in his jute factory so far as required, and particularly in the construction and running of the machinery, and not to give any third person information directly or indirectly in regard to any portion of the machinery, but to "consider all of said machinery as sacred to be used only for the benefit of said Peabody or his assigns, and by all means in his power prevent other persons from

obtaining any information in regard to it such as would enable them to use it," and, on the part of Peabody, to pay Norfolk an annual salary "in full compensation for the above described services," provided he should render his services acceptable to Peabody as he had theretofore, and Peabody or his assigns should continue the business of manufacturing jute goods. The "above described services" clearly include, not only the affirmative promise to serve as an engineer, but the negative promise not to disclose the secret, and to do his best to conceal it; and the salary is a legal and sufficient consideration for all the agreements of Norfolk.

The plaintiffs do not ask for specific performance of Norfolk's promise to serve as engineer. It is therefore unnecessary to consider whether that promise is limited in point of time or determinable at pleasure, or is capable of being specifically enforced. Whatever may be the limit or effect of his obligation to serve, he is bound by his contract never to disclose the secret confidentially imparted to him during the term of his actual service. And this part of his agreement may be specifically enforced in equity, even if the other part could not. *Lumley v. Wagner*, 1 De Gex, Macn. & Gord. 604.

The bill alleges that the invention and the process of manufacture have been kept secret, and that the secret is the property of the original plaintiff and of great value to him, and was confidentially imparted to Norfolk; and on demurrer these allegations must be taken to be true. Although the process is carried on in a large factory, the workmen may not understand or be intrusted with the secret, or may have acquired a knowledge of it upon the like confidence. A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of, violation of contract and breach of confidence, undertake to disclose it or to reap the benefit of it. The danger of divulging the secret in the course of a judicial investigation affords in our opinion no satisfactory reason why a court of equity should refuse all remedy against the wrongdoers.

The supplemental bill alleges, and the demurrer admits, that Cook, with notice of the relations between Peabody and Norfolk, has made arrangements to have the secret communicated to him by Norfolk, and together with him to use it for their own benefit. Upon such a state of facts, Cook has no better equity than Norfolk.

The executors of the will of the original plaintiff succeed to his rights, and appear on the allegations of the bills to be entitled to the relief prayed for. *Morison v. Moat*, above cited.

Demurrer overruled.

STONE v. GOSS.

(Court of Errors and Appeals of New Jersey, 1903. 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794.)

SWAYZE, J. This is a bill for an injunction to restrain Goss from divulging a secret process of the complainants for the manufacture of depilatories (compounds used to remove hair and wool from skins and hides), and to restrain the Grasselli Chemical Company from using or divulging any information derived from Goss with reference to the secret process. The Vice Chancellor advised a decree for the complainants.

Goss was in the employ of the complainants from 1892 to 1901, during which time they had, by constant experiment, made improvements in the manufacture of depilatories, and had put upon the market what were called "Stone's XXX Depilatory" and "Stone's XXXX Depilatory." The ingredients out of which the depilatories were made were well known and had been in use for several years before 1892, but the depilatories manufactured had not been entirely satisfactory until the complainants succeeded in producing the XXX and XXXX. The Grasselli Chemical Company, along with other branches of manufacture, was also engaged in the manufacture of depilatories from the same ingredients used by the complainants, and was their chief business rival. Some time in the year 1901, the Grasselli Chemical Company bought, through one of its agents, some of the complainants' XXX Depilatory, and caused a chemical analysis to be made, and thereafter conducted experiments with a view to the production of a depilatory equal in quality to the product of the complainants. In August, 1901, Goss became dissatisfied with his position with the complainants. He had received a letter two or three months before from Atteaux, a sales agent of the defendant company in Boston. About the middle of August, Goss wrote Atteaux, and by appointment met at Atteaux's office Grant, a director of the Grasselli Chemical Company. Goss fixes the date of this interview at about the middle of August, and, as he says he gave the complainants eight days' notice that he would leave their employ, and left September 3d, he apparently gave the notice after the interview with Grant. In the second week in September, he went into the employ of the Grasselli Company, in what was known as the sulphide department, which was the department concerned with the manufacture of depilatories. During the first two or three weeks he was in the employ of the Grasselli Company he did no work, but immediately upon his employment, Frazier, the superintendent of its plant at Tremley, questioned him "in regard to what he knew about the manufacture of depilatories," and Goss informed Frazier of the complainants' method of manufacture, and described fully the complainants' apparatus. Frazier reported to the defendant company the information obtained from Goss, with a sketch of the apparatus, and

the manner in which it should be made and put up. This sketch was made by Frazier, and corrected by Goss. The Grasselli Company approved of Frazier's plan, and directed him to put up the shed to contain the apparatus. He was proceeding with this work when stopped by the injunction.

The complainants allege that Goss was under a contract with them not to reveal the secrets of manufacture. Goss denies this contract. We agree with the Vice Chancellor that the contract is established by the weight of evidence. The right of a manufacturer, whose goods are made by an unpatented secret process, to protection by injunction against the divulging of his secret in a proper case, is now established by a well-considered line of cases in England and in several states [citing cases]. These cases establish the principle that employes of one having a trade secret, who are under an express contract, or a contract implied from their confidential relation to their employer, not to disclose that secret, will be enjoined from divulging the same to the injury of their employer, whether before or after they have left his employ; and that other persons who induce the employé to disclose the secret, knowing of his contract not to disclose the same, or knowing that his disclosure is in violation of the confidence reposed in him by his employer, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts. We approve the principle thus established.

We find in this case, as already stated, that an express contract between the complainants and Goss for secrecy is proved. Two questions remain: (1) Did Stone possess a secret process for the manufacture of depilatories? (2) Did the Grasselli Chemical Company obtain knowledge of that secret process from Goss under such circumstances that it should be enjoined from making use of it?

1. The ingredients used in the manufacture of Stone's depilatories were well known, and had been used for that purpose for years before the XXX and XXXX were put upon the market, and the same ingredients were used by the Grasselli Chemical Company in the manufacture of a depilatory. It is urged that the only advantage possessed by the complainants arose out of skill in handling, and not out of a secret process, and that there was no secret either in the ingredients or in the method of compounding them. The complainants combined the ingredients by a different method from any other in use, and the result was a product of a different character. The complainants' process of manufacture was considerably more complicated than the defendants'. The secret consisted in a knowledge of the proper method of mixing the ingredients, and treating them, in order to produce a product of proper consistency.

The difference between mere skill in manipulation and a process of manufacture is illustrated by a recent case in the United States Su-

preme Court. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. In this case the process which was held patentable consisted in retaining a quantity of molten iron in a reservoir, to serve as a basis for mixing the varying products of the blast furnaces preparatory to converting the same into steel. The difficulty to be overcome was a lack of uniformity in the molten metal. The use of a reservoir in which the varying products of the blast furnaces had been mixed was known prior to the patent involved in that case, but the importance of always maintaining in the reservoir a sufficient quantity of molten metal to "dominate" (to use the court's expression) the whole mass had not been before appreciated. The majority of the court held that the process was therefore patentable. There the ingredients were the same, the idea of mixing the molten metal of different qualities was not new, and the only novelty was the retention in the reservoir of a "dominant mass" sufficiently large to control the average character of the product from time to time. If such an improvement was patentable, it is clear that a process of treating the ingredients, as complicated as that involved in the present case, resulting in a product of novel character, is a process which, if kept secret, is entitled to the protection of the court. The evidence is convincing that the complainants made efforts to keep the process secret, and had succeeded until Goss revealed the secret to the Grasselli Chemical Company. Since we are satisfied that Stone had a secret process of manufacturing a depilatory, and that Goss was under a contractual obligation not to disclose the secret, the complainants are clearly entitled to an injunction against Goss.

The question remains whether the injunction should go also against the Grasselli Chemical Company.

2. The evidence satisfies us that the Grasselli Chemical Company knew that Stone was manufacturing a superior article to its own; that it had been for some time trying to discover Stone's method of manufacture; that it had entered into correspondence with Goss and employed him while he was still in Stone's service; and that, immediately upon his coming into the employ of the defendant company, it sought through Frazier to learn Stone's secret, and, having learned it, was about to make use of it to manufacture a similar substance by Stone's process, to be sold in competition with his. These facts leave no doubt that the Grasselli Chemical Company acted in fraud of Stone's rights in the effort to learn his secret by inducing his employé to divulge the same. Even though they did not know of the contract, they must have known of the confidential character of Stone's business, and the confidential character of the relation between him and his employés. The defendant company is a party to Goss's fraudulent disclosure of the secret, and the complainants were entitled to an injunction restraining the Grasselli Chemical Company from making any use of the information thus obtained from Goss. The injunction should not be re-

fused because the process was such that it would probably have been discovered by independent experiments in the manipulation of the ingredients of which the products of both parties were alike composed. The Grasselli Chemical Company, by its own conduct, has put itself in such a position that it may even lose the advantage of future independent experiments. It would be quite impossible hereafter to decide how much of the improvement in the product of the Grasselli Chemical Company would be attributable to its own independent efforts, and how much to the knowledge of Stone's process fraudulently acquired by it. Every doubt must be resolved against the parties to a fraudulent act. If the defendant thereby suffers, it suffers only by reason of having been a party to Goss's fraudulent disclosure of the secret. The legal principle governing the case is, in effect, the same that was applied by this court to a case of fraudulent intermixture of goods. *Jewett v. Dringer*, 30 N. J. Eq. 291.¹⁷

The decree should be affirmed, with costs.

STEIN v. NATIONAL LIFE ASS'N.

(Supreme Court of Georgia, 1899. 105 Ga. 821, 32 S. E. 615, 46 L. R. A. 150.)

FISH, J. Simon Stein entered into an agreement with the National Life Association, of Hartford, Conn., whereby he became its general or managing agent in and for the states of Georgia and Alabama, for the purpose of procuring applications for membership in the association, delivering policies issued upon applications so effected, and collecting the first payments thereon. * * *

In August, 1898, the National Life Association filed a petition in the superior court against Stein, to which was attached a copy of the contract above mentioned. This petition alleged that Stein had, under the contract, been appointed general or managing agent for the association for Georgia and Alabama, with headquarters in Atlanta; that his duties were of a nature vital to the association; that, so far from complying with the contract, he had totally neglected his duties as agent, and violated his contract, to the incalculable and irreparable damage of the association, and, unless restrained from further representing the association, would continue to injure and damage it; that books of original entry were necessary to the business, but that Stein pretended that he kept no such books, and refused to show petitioner such memoranda as he had kept; that an agent of the association, regularly accredited and with plenary authority, attempted persistently to obtain from Stein information as to the business, but that Stein as persistently refused to give it; that Stein likewise declined to give such information to the association's attorneys; that Stein attempted to damage the business of the association, and pre-

¹⁷ A part of the opinion dealing with another question is omitted.

vent policy holders from paying their premiums, intending to force the association to buy him out. He declined to make report for the last month or two, and made conflicting statements as to the amount due. The petition alleged that Stein was due a large sum; that he was a man of small means, with his property incumbered; and that there would be no means at law of estimating the damages which would accrue if Stein were allowed to continue to interfere with and damage the business of the association. It prayed for injunction, receiver, accounting, and general relief, but waived discovery.

Stein, in his answer, alleged that he had never abandoned the contract until long after the petitioner had done so, and had committed breaches of it which made it impossible for him to continue as its agent under the contract. He claimed that the association had violated its contract with its policy holders, and admitted in letters to such policy holders that it had done so. * * * Defendant had no objections to being enjoined from acting as agent of the association, or to the appointment of a receiver. He denied indebtedness, except on certain notes not due. He resisted the prayer that he be restrained from "in any manner influencing its policy holders against said petitioner."¹⁸

The case was tried upon the petition and answer, and an affidavit signed by certain policy holders. Exception is taken to the admission in evidence of the affidavit; but, under the view we take of the case, it is not necessary to decide whether or not it should have been admitted. It tended to show only that Stein had attempted to dissuade affiants from continuing their policies. The judge granted an order, to be of force until final decree in the case, restraining Stein from acting as agent of the association or collecting any moneys or assets belonging to it, directing the receiver to turn over the property in his hands to the association, discharging the receiver and fixing his compensation, and further ordering "that said Simon Stein, his agents, clerks, employ  s, confederates, and associates, be, and they are hereby, enjoined from in any wise approaching or communicating with policy holders in said company for the purpose of influencing or procuring them to lapse their policies or discontinue the same, and from influencing or attempting to influence policy holders to transfer their insurance in said National Life Association to any life insurance company, and from doing or attempting to do any such acts by himself or through others." To this latter portion of the order Stein excepted.

Careful reading of the contract entered into by Stein and the association reveals no stipulation that Stein should, after severance of his connection with the association, represent no other insurance company, or refrain from influencing policy holders to allow their policies to lapse; nor was there language from which such provision should be implied. Hence the cases cited which hold that certain contracts

¹⁸ The statement of facts has been abridged.

in partial restraint of trade are enforceable are not here in point. Contracts in restraint of trade are enforced only when the restraint is reasonably limited as to time or place. The order granted in the present case is in restraint of trade, presumably in the enforcement of a contract, when not only is there no limitation in the contract of such restraint, but when there is no stipulation in the contract which can be construed as referring to the question of restraint at all. Courts of equity will sometimes enjoin the commission of a tort, but we cannot see that this doctrine can be applied here; for Stein is enjoined from doing things which, however injurious to the association, are certainly not tortious. It may be that he had been guilty of an actionable tort in making false statements as to the association, and to its injury; but he is enjoined by the judge's order, not from repeating any such statements, but from using any means whatever to injure the business of the association, or to win over its policy holders to any other insurance company. The injunction must have been granted, as to this matter, by applying to the case the equitable principles stated in *High, Inj.* § 19, as follows:¹⁹ "The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction." Equity interferes in such cases in order to prevent an abuse of confidence, and where there has been no confidential relation, and, consequently, no trust reposed, the rule does not apply.

The order granted in the present case restrains the plaintiff in error from attempting to influence policy holders in the association to discontinue their policies, or to transfer them to any other life insurance company, either by the communication of what he knows of the association or otherwise. Even, however, were it limited to communications of what he knows of the association, it would be erroneous. The relation of Stein to the association was not a confidential one, in the sense that he, by reason of it, acquired a knowledge of any business secrets. The business had been largely built up by him and his employés, and that knowledge of the policy holders which would be useful to him, in the event of his representing as agent another company, was not confided to him by the association, if derived from it at all. Persons may have taken out policies in the association on account of personal friendship for Stein, or confidence in his integrity, and there is no reason why he should not be allowed to solicit their business for another company which he represents, his agency for the association having been terminated. If this injunction was proper, then any general insurance agent, whose contract, as such, had been terminated, could be restrained from further pursuing, in the interest of another company, the business of his calling among those with whom he might be able to do the best work—those whom he had secured as policy holders in the company he first represented. Under

¹⁹ A part of this quotation is omitted.

this injunction, Stein could not solicit, upon any ground or for any reason, the transfer of business from the plaintiff association to another company, though he had not so agreed in his contract with the association, and though that contract was at an end; and that, too, in a case where he relied upon no information which had been communicated to him, in confidence, as a business or trade secret.

For the reasons given above, and under the facts as they appear in the record, we think that the judge below abused his discretion in granting that part of the order of which plaintiff in error complains, and the judgment of the court is accordingly reversed. All the justices concurring.

PEOPLE'S COAT, APRON & TOWEL SUPPLY CO. v. LIGHT.

(Supreme Court of New York, 1916. 171 App. Div. 671, 157 N. Y. Supp. 15.)

Action by the People's Coat, Apron & Towel Supply Company against Harry Light and Samuel Cohen. From a judgment dismissing the complaint on the merits, plaintiff appeals.

See, also, 168 App. Div. 142, 153 N. Y. Supp. 330.

THOMAS, J. Light was for some three years in plaintiff's service, where, as driver of its wagon, delivering laundered coats and aprons to individuals and collecting payment for the use thereof, he acquired knowledge of, and access to, plaintiff's customers. Discharged by plaintiff on October 1, 1914, Light after a brief interval entered the service of defendant Cohen, who by his inducement, under the name of the Mutual Coat & Apron Supply Company, began a business similar to that of the plaintiff. Light, using his knowledge of plaintiff's customers acquired in its service, and by virtue of his former representation of plaintiff, went to them and induced them to substitute Cohen's outfitting for that of the plaintiff, and thereby secured their business for Cohen and deprived plaintiff of it. That result was obtained in some instances through the solicitation of Light, in other cases by failure of Light to state that he was transferring the custom to Cohen, and leaving the customer to believe that Light still represented the plaintiff. Light, to Cohen's knowledge, stated his intention to secure plaintiff's customers.

Light's plan to use his knowledge and opportunity, resulting from his former employment by plaintiff, to deprive plaintiff of its customers and to turn them to Cohen, and Cohen's connivance and participation therein, are proven clearly. The important question is whether those who so contrived it may be enjoined from prosecuting the scheme and enjoying the benefits of it. The defendants rely upon *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910. In that case a salesman going from one employer to another carried to his service information of plaintiff's customers, who dealt in butter and eggs at advertised locations, and who in most cases dealt, not only with the

plaintiff, but also with his competitors. In the action at bar, individuals in varied occupations, that require the use of coats and aprons, were gained one by one to use plaintiff's garments, which were exchanged, the washed for the soiled, once a week or oftener. The customers largely were individual employes, unadvertised, and reached only by personal contact. There is no evidence that Light had a written list of them. There was in his head what was equivalent. They were on routes, in streets, and at numbers revealed to him through his service with plaintiff. Their faces were familiar to him, and their identity known because of such employment. He had entry and introduction, and solicited them, not as strangers, but as persons known to him. He used what he had gained through plaintiff to take away its customers.

It is idle to say that he did not have the advantage of a knowledge and acquaintance that he would not have had, save for his former employment, and it is unimportant that there was some other possible way of discovering and reaching them. It is clear enough what means he used. The subject in its general features was considered in an action against an employer's former agent, in *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874, affirmed 131 App. Div. 922, 115 N. Y. Supp. 1150, and again upon the trial of that case, 64 Misc. Rep. 374, 118 N. Y. Supp. 461, and again in an action against the second employer, 69 Misc. Rep. 90, 124 N. Y. Supp. 956. The general equitable principles were discussed, and they are applicable here. The defendants should be enjoined from soliciting, through Light or any information obtained from him, plaintiff's former or present customers, of whom Light obtained knowledge while in the service of the plaintiff and from serving the same, and from serving plaintiff's former customers, secured by Light after entering Cohen's service.

The judgment should be reversed, and judgment, with costs here and in the trial court, directed for plaintiff in accordance with findings and conclusions of law to be settled. All concur.

FULTON GRAND LAUNDRY CO. v. JOHNSON.

(Court of Appeals of Maryland, 1922. 117 Atl. 753.)

ADKINS, J. This is an appeal from an order sustaining a demurrer to the bill of complaint filed by appellant, and dissolving a preliminary injunction which had been previously granted. The allegations of the bill, so far as it is necessary to recite them, are substantially as follows:

The plaintiff is a corporation engaged in the general laundry business at No. 1719 East Oliver street, in Baltimore city; that the most valuable asset of the said business is the good will thereof which has been created by a course of dealing with customers for a number of

years, which customers were secured only after great labor and expense; that plaintiff draws business from all that portion of said city lying east of Charles street, which section is divided by plaintiff into districts or routes, one of which is designated No. 6; that a driver, who also acts as a solicitor for new work, is assigned to each route, and is given a list of customers thereon from whom he receives laundry bundles, which he takes to the plant, and which, after they are laundered, he returns to the customer, and collects the charges thereon; that the expenses of maintaining the route are borne by plaintiff; that the defendant has for three years been employed by plaintiff as a driver and assigned to route No. 6; that the defendant was a trusted employee, and while in the service of plaintiff acquired knowledge of and access to all the customers of plaintiff on said route; that the defendant left the employ of plaintiff on September 3, 1921, without any previous notice, and without any opportunity to the plaintiff to procure another driver for said route; that while in the employ of plaintiff, and without its knowledge or permission, defendant advised customers of plaintiff on said route that he intended to go into business for himself, and induced them to substitute his service for that of plaintiff and on the 5th day of September, abusing the confidence imposed in him, collected laundry bundles from about 45 of plaintiff's customers on said route, which number represents about 90 per cent. of those who usually send their work to plaintiff on the first trip Monday morning, and turned the work over to some other laundry; that defendant was able to do this because of the knowledge of plaintiff's customers acquired by him while in its service, and by virtue of his representation of it; that a few days before leaving plaintiff's employ defendant told plaintiff he had no intention of leaving, and at that time was undermining its business by attempting to entice its customers away from it; that, if he is permitted to solicit the business and patronage of plaintiff on said route, great and irreparable damage will be done to plaintiff in its said business.

The theory of appellant is that the list of customers of appellant is a trade secret, and that an employee who has obtained the names of customers and has acquired his good standing with them by reason of the opportunity derived from his employment should not be permitted to use such information, or capitalize his popularity thus acquired, to the injury of his employer after the termination of his service.

We have been referred to no decisions of this court, nor have we been able to find any, bearing directly on this question. The decisions in this country and in England seem to be fairly harmonious in principle as to the duty of courts to protect owners of trade secrets from disclosure by employees, but the divergences begin when the question to be determined in particular cases is whether the thing sought to be protected should be classed as a trade secret. And this is the real question presented in this case. A thing can hardly be said to be a

secret, in the sense that it should be guarded by a court of equity, which is susceptible of discovery by observation, and which is open to the observation of any one who thinks it worth while to observe. In this case it was not necessary for the new employer of appellee to seek his services in order to obtain the names of appellant's customers whom appellee served. He could obtain this information by the simple process of observing each day for a week where he stopped on his daily rounds. We have no difficulty in reaching the conclusion that there is no trade secret involved in this case.

We have been referred to several California decisions and to two decisions by the intermediate courts of New York and to an English case which support the view contended for by appellant. *Laundry Co. v. Lozier*, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628; *Lamb v. Evans*, [1893] Ch. Div. 218; *Supply Co. v. Light et al.*, 171 App. Div. 671, 157 N. Y. Supp. 15; *Witkop v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874; *Cornish v. Dickey*, 172 Cal. 120, 155 Pac. 629. That view is also supported by Nims on Unfair Competition, § 222. But, while we do not decide that there might not be cases in which an employer should be protected from the use by an employee of a list of customers fraudulently and surreptitiously obtained, or where, in the nature of the particular case, or by reason of the care used in concealing them, the names of customers are so guarded as not to be easily obtainable by others than confidential employees, we are not willing to hold that, in any ordinary business, an employee, on going into business for himself or into the employ of another, should be enjoined from seeking to do business with friends he has made in the course of a previous employment merely because he became acquainted with them while so engaged, and as a result of such previous employment. Under such a rule a traveling salesman, every time he changed employers, if in a like business, would be compelled to give up all the friends and business acquaintances made during the previous employment. Such a rule would tend to destroy the freedom of employees, and to reduce them to a condition of industrial servitude. See *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; *Stein v. National Life Association*, 46 L. R. A. 150; *American Specialty Co. v. Collis Co.* (D. C.) 235 Fed. 935. It is a significant fact that very few cases are to be found on either side of this proposition. That would seem to indicate that few attempts have been made by employers to invoke the principle contended for by appellant.

Of course there is nothing to prevent an employer from expressly contracting with his employee that the latter shall not, on leaving the employer's service, solicit business in the same line from the customers of the employer in a particular territory, and, if, by reason of the nature of the laundry business, such protection is necessary, it can easily be secured by such contracts.

While the case of *Rosenstein v. Zentz*, 118 Md. 564, 85 Atl. 675, 44 L. R. A. (N. S.) 63, was decided on other grounds and on different state of facts, what was said in that case (118 Md. at page 575, 85 Atl. 675, 44 L. R. A. [N. S.] 63) reflects somewhat the views of the court on the principle involved in the present case, especially in regard to the right to profit by the influence and standing which a capable and gentlemanly employee establishes with the customers with whom he comes in contact.

Judgment affirmed, with costs to appellee.

OFFUTT, J., dissenting.

SECTION 3.—HIS DEVICES FOR DEMAND CREATION

FRANKS v. WEAVER.

(Rolls Court, 1847. 10 Beav. 297.)

This was a motion for an injunction under the following circumstances:

In 1834 the plaintiff, Mr. Franks, invented a certain medicine or medical preparation, to which he gave the name of "Franks' Specific Solution of Copaiba," and some of the highest medical authorities, having tested its efficacy, gave to the plaintiff certain testimonials in writing, certifying the value and efficacy of the medicine.

He sold the medicine in wrappers, headed "Franks' Specific Solution of Copaiba," which, after eulogising the medicine at some length, contained "general directions for its use," and concluded with copies of the several "testimonials" of the most eminent surgeons.

The plaintiff lately discovered that the defendant, Weaver, who had been appointed one of the plaintiff's agents for the sale of this medicine in the country, had been in the habit of selling another preparation of copaiba of his own.

The labels of the defendant were headed, "Chemical Solution of Copaiba," and, after referring to the curative powers of the balsam of copaiba, it stated that its nauseous and offensive properties had been removed by Mr. Franks, to whom was due the merit of originally introducing, under the appellation of "Specific Solution of Copaiba," a preparation of the balsam, which was perfectly miscible with water, &c. It then went on to state the merits of "The Chemical Solution" and proceeded as follows: "Mr. Franks' Specific Solution of Copaiba was extensively adopted by the late Sir Astley Cooper, Bart., F. R. S., and was also successfully employed in the public and private practices of the following (as well as many other) distinguished members of the profession, whose testimonials are subjoined: Sir Benjamin Brodie, Bart., F. R. S., Joseph Henry Green, Esq., F. R. S., Bransby B. Cooper, Esq., F. R. S., Members of the Council of the Royal College of

Surgeons, London, and also by Alexander Tweedie, Esq., M. D., M. R. C. S., H. A. Caesar, M. D., M. R. C. S." The directions for use then followed, which were similar to those used by the plaintiff.

Four of the testimonials given by these gentlemen to the plaintiff and included in his wrapper were subjoined in totidem verbis, testifying to the merits of Mr. Franks' preparation.

These facts were verified by affidavit, which also stated "that the purpose or design of the defendant, in using or referring, in his aforesaid covers, wrappers, &c., to the plaintiff's name, and to the reputation, qualities, &c., of the plaintiff's said medicine and testimonials, was to indicate or imply to the public, or lead them to suppose and believe, that the mixture of the defendant was the same as or of the same or a similar nature, or otherwise to deceive or impose upon the public, and, through false representations, induce them to purchase, the medicine of the defendant."

The defendant, by his affidavit, stated, that for many years it had been the practice and custom of himself and other wholesale druggists, to make and vend a solution of copaiba, and that various formulæ for making solutions of copaiba had been published in different medical works.

That for ten years, he had prepared a solution of copaiba in bottles of 20 lbs., on which were pasted a printed paper as stated by the plaintiff, but that he never used any wrapper but plain paper.

He denied the design attributed to him by the plaintiff, and stated, that his sole reason for using the plaintiff's name and his said alleged testimonials was, to shew the faculty that his chemical solution of copaiba was of a nature similar to the medicine sold by the plaintiff; and to shew the efficacy of a medicine similar to that prepared by the plaintiff, and that a solution of copaiba was used by certain of the faculty whose names were appended to each label. He stated that his said medicine was always sold in a form entirely different to the medicine of the plaintiff, and that he always sold his said medicine in bulk, that is, by the pound, covered with a plain paper; whereas the medicine of the plaintiff was not sold in bulk, but by the bottle, covered with printed wrappers, and that the largest of such bottles did not contain more than three quarters of a pound. That his said medicine was sold at a price less by two-thirds than the medicine of the plaintiff. That he had never sold or attempted to sell his said medicine as or for the plaintiff's medicine, or as an imitation thereof, but that when any customer had ordered or enquired for Franks' Specific Solution of Copaiba, the medicine of the plaintiff had been supplied by him; and that he had publicly sold the said chemical solution of copaiba, as a medicine prepared by him, for several years, in manner and with the wrapper aforesaid, without any concealment or attempt at concealment.

A motion was now made for an injunction, to restrain the defendant from making, vending, &c., any preparation, &c., having upon

the same, any cover, wrapper, &c., in the terms, &c., of the cover, wrapper, &c., used by the said plaintiff, or any other cover, wrapper, &c., containing any testimonial in favour of the plaintiff's medicine, described as "Franks' Specific," &c., or indicating or implying, or tending to induce the public or purchasers to suppose, that such preparation, mixture, &c., was the same as, or of the same, or a similar nature or character as "Franks' Specific Solution of Copaiba," or in which the plaintiff's name was mentioned or referred to, in connection with any preparation, mixture, &c., made, vended, &c., by the said defendant, or in which any use was made of the character and reputation of the plaintiff, or his said "Specific Solution of Copaiba."

THE MASTER OF THE ROLLS [LORD LANGDALE]. Instances of tradesmen endeavouring to obtain an advantage to themselves, by the use of the name and reputation of others, have, unfortunately, of late become too common.

In this case it appears, that copaiba is a substance which is capable of being dissolved in different ways, so that different solutions of it may be prepared. The plaintiff has prepared one solution, which appears to have received the approbation of several medical men, and they have, in different forms, certified the value of that preparation. The defendant has also made a preparation, which he calls a "Chemical Solution of Copaiba." He has a perfect right to do this, and by honest means to procure as extensive a sale for it as he can; and if he had thought fit to sell it by the name of "Weaver's Chemical Solution of Copaiba," or by any other name unconnected with the name of the plaintiff, the plaintiff, at least, could not have complained, for the defendant has a right to enter into a fair competition with the plaintiff, or any one else, in the sale of this article.

The defendant, however, has thought fit to sell and encourage the sale of his own solution, by means of labels or wrappers, in which he employed the name and adopted the directions for use of the plaintiff; he makes a free use of the reputation of the plaintiff, and advertises those letters or certificates which constitute some evidence, such as it is, of the reputation which the plaintiff has acquired. It is very true, that if any one compares the plaintiff's wrappers with the labels used by the defendant, he will find a very considerable difference. The difference is even striking; but it is not by the similarity of form or the mode of printing that we can get at any result in this case. Again, if anybody critically reads the advertisement of the defendant he will find that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say that the preparation he is selling is made by the plaintiff, and yet for all that nobody can look at all these things, without observing that the name and the testimonials of the plaintiff are so craftily employed as to be well calculated to produce, in the minds of ordinary readers, the impression that the mixture or solution prepared and sold by the

defendant is the same as that to which these testimonials are applicable; that is to say, the mixture or solution of the plaintiff.

If this be so, and no person can well doubt it, they are adopted by the defendant for the purpose of acquiring and appropriating to himself these encomiums, which he well knows are applicable to the plaintiff. This then is the common case.

Nobody has been able to define what fraud is, it is so multiform. In this case it consists in the crafty adaptation of these words in such a manner as to make it appear that the thing sold is prepared by the plaintiff. It is difficult for any ordinary person, not critically examining the labels and the directions for use, to derive any different impression; and I am quite persuaded that the defendant intended it. If he imagines that because the similarity is not so great, but that people may possibly find out the difference, or because the label does not contain the name of George Franks, or because the preparation is sold in bottles of a different size and form, that therefore he does not come within the scope of those decisions, he is under a great misconception.

I think that this case falls within the principle of the former decisions, and that the defendant is doing, ordinarily and constantly, that which is calculated to make persons believe that, when he is selling his own article, he is in fact selling the plaintiff's. He does this by using the name of the plaintiff in this particular form. This is a palpable fraud on the plaintiff, which he has no right to commit, and he must therefore be restrained by injunction, so far at least as may be necessary for the protection of the plaintiff, but not further.

The plaintiff has no exclusive right to make the mixture or sell it; the defendant may sell his own mixture, which, for anything I know, may be quite as good as the plaintiff's, but he must do it in an open fair way; he has no right to use the plaintiff's name. Care must be taken that the injunction be so framed as not to go further than to prevent the defendant using the name or testimonials of the plaintiff for the purpose of securing to himself an unjust advantage to which he has no title.

SINGER MFG. CO. v. DOMESTIC SEWING MACH. CO.

(Supreme Court of Georgia, 1872. 49 Ga. 70, 15 Am. Rep. 674.)

The Singer Manufacturing Company, a corporation created under the laws of New York, transacting business in the city of Atlanta, by an agent, filed its bill against the Domestic Sewing Machine Company, a corporation created under the laws of Rhode Island, doing business in the city of Atlanta, by an agent, R. J. Wiles, the agent of said company, Alexander S. Abrams, Henry W. Grady and R. A. Alston, copartners using the firm name of the Herald Publishing Company, and W. A. Hemphill and E. Y. Clark, copartners, un-

der the firm name of W. A. Hemphill & Company, proprietors of the Atlanta Constitution, a newspaper published in said city of Atlanta, making the following case:

Complainant is engaged in the manufacture and sale of sewing machines. On October 14, 1872, the Georgia State Agricultural Society held its annual fair in the county of Fulton, and invited all persons interested in sewing machines to exhibit them at said fair, under the regulations established by said society, and promised to award a diploma to the manufacturer and proprietor of the best family machine, a diploma to the manufacturer and proprietor of the best manufacturing machine, and a diploma to the manufacturer and proprietor of the machine with the best attachments, said diplomas to be determined and awarded by a committee appointed by said society to inspect sewing machines and to award premiums. Complainant competed for each of the aforesaid diplomas. Many other machines were also presented, and amongst them the one manufactured and owned by the Domestic Sewing Machine Company. Said committee reported the machine of complainant to be the best family machine and the best manufacturing machine, and diplomas were awarded accordingly. Notwithstanding these facts the Domestic Sewing Machine Company has published in the Atlanta Herald, a newspaper owned and controlled by the Herald Publishing Company, and in the Atlanta Constitution, a newspaper owned and controlled by W. A. Hemphill & Company, that the said committee decided and reported that "the Domestic machine, as a family machine, is the best." Complainant, for the purpose of denying such statement, published the report of the committee as it was rendered. The defendants then published that the report of the committee as set forth by complainant was untrue, and that said committee had reported that the Domestic machine, as a family machine, was the best. The damages to complainant resulting from the aforesaid publication are inestimable. Prayer, that the writ of injunction may issue, restraining defendants from saying by publication or otherwise that said society did not award the first premiums to complainant for the best family machine, and for the best manufacturing machine. That the writ of subpoena may issue.

The defendants answered the bill, but their defenses are unnecessary to an understanding of the decision of the court, and are therefore omitted.

The injunction was denied, and complainant excepted.

MCCAY, Judge. A clear and definite statement of the exact thing sought for by this bill will, as it seems to us, justify the judge in his refusal to grant the injunction. There is no complaint that the defendant is doing or publishing anything to induce the public to believe that the machine he sells is the same as the complainant's. So far as we have been able to examine them, all the trade-mark cases

turn upon this: They declare that a man shall be enjoined from passing off his wares as the product of another man—from using devices to persuade the public that in buying his wares they are, in fact, buying wares guaranteed by the skill and reputation of a rival dealer. *Delaware & H. Canal Co. v. Clark*, 7 Blatch. 112, Fed. Cas. No. 3,764; *High on Injunctions*, § 677. Again, this bill does not claim that the defendant is interfering with the complainant's right to the exclusive use of whatever credit the report of this committee gives him. His right to publish is unlimited. Indeed, the complaint is that the defendant does *not* publish the report. The true complaint of the bill, at last, is that the defendant has denied that the society gave to complainant the premium, and has asserted that in truth the society gave it to himself. It is not said that he is passing off his wares by putting complainant's mark on them, nor that he is publishing without authority a report which the claimant is alone entitled to publish, but that he is unblushingly denying the truth of complainants having gotten the prize, and claiming that he got it himself. He is not *taking* complainant's property—he is not *infringing* the plaintiff's right of property. He is denying—it may be falsely and injuriously denying—plaintiff's right to whatever credit the premium of the society gives. Will an injunction lie to prohibit such a wrong? It is admitted there is no precedent for such an injunction in England or America. This is itself a very strong argument against it. For many years prizes, premiums and medals have been a favorite mode of publicly declaring the excellence of wares of every kind, and prize shows and contests have been an every day occurrence for a century, both here and in England. The fact that no case can be found enjoining the denial of such a reward, having been given, is a strong proof that solicitors and chancellors have not deemed such a denial a subject for injunction. The general rule is that to get an injunction you must show the infringement of a *property* right.

It is well settled that an injunction will not be granted to restrain slander or libel of title or of reputation. 6 Simmons, 297; 11 Beavan, 112; 11 Simmons, 582. Not that it is not a wrong, not that the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law.

The case made by the bill is one of words, which are untrue in fact, and which are calculated to injure the credit of complainant's business and advance the business of defendant. If a wrong capable of redress before the courts at all, it comes more nearly within the definition of a libel or of slander concerning one's trade or business, than anything else. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character,

is one of such injuries. But there are very many wrongs, wrongs recognizable and capable of redress at law, that yet are not such wrongs as a court of equity will enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule. High on Injunctions, § 693; Id. §§ 23-28. The most that can be said of the conduct of the defendant is, that he is telling and publishing untruths—lies, if you will—calculated and intended to help himself and damage the complainant. To say that he may be enjoined from doing this, is to say that the writ of injunction may issue to restrain a libel or to stop slander. It is true that courts of equity constantly refuse to lay down any absolute limitation to its power to issue this writ. But this only means that cases coming within the principles on which the court has long acted are not beyond its power simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable, expected injury to a property right. It is a perversion of language to say that the complainant has a property right in *the truth* of the report. He has, perhaps, a right to the report, but a perversion of the truth, a claim that it is different from what it in fact is, can in no fair sense be called an infringement of his right of property in the report.

For these reasons we do not think the complainant entitled to an injunction.

Judgment affirmed.

WESTMINISTER LAUNDRY CO. v. HESSE ENVELOPE CO.

(St. Louis Court of Appeals, Missouri, 1913. 174 Mo. App. 238, 156 S. W. 767.)

Action by the Westminister Laundry Company against the Hesse Envelope Company. From a judgment for plaintiff, defendant appeals. Reversed.

NORTON, J. This is a suit for damages in which plaintiff recovered a verdict for \$1. On this verdict judgment was given, and defendant prosecutes an appeal therefrom.

All of the relevant facts appear from the face of the petition, and the question of liability is to be determined thereon. It appears that the plaintiff, the defendant, and the D'Arcy Advertising Company are each corporations engaged in their respective callings in the city of St. Louis. Plaintiff owns and is engaged in the business of operating a steam laundry. Defendant is engaged in the business of manufacturing envelopes. The D'Arcy Advertising Company is engaged in the advertising business; that is to say, it places advertisements in St. Louis for those who choose to patronize it. The plaintiff laundry company engaged the D'Arcy Advertising Company to do certain advertising for it by running what is known as a "blind" advertisement. Such "blind" advertisement is described in the petition as follows: "The fundamental idea of same (the 'blind' advertisement) being the use of some

striking device well adapted to attract public attention, but unaccompanied, upon its first appearance, by the name of the advertiser using it, other matter being added later and the name of the advertiser, also, being given when the curiosity of the public has been sufficiently piqued and the attention of the public has been excited by the 'blind' nature of the advertisement." The striking device referred to in the quotation from the petition and that contemplated in the instant case is the word "stopurkicken."

The petition avers that plaintiff entered into a contract with the D'Arcy Advertising Company, whereby it was to have the exclusive use of the word "stopurkicken"; that the D'Arcy Advertising Company, in pursuance of plaintiff's plan, had the word "stopurkicken" published upon signboards and by way of printed cards. After the word "stopurkicken" had been so used, and before plaintiff had time to determine upon a proper supplement to such advertisement to disclose its own name and identity, the defendant, Hesse Envelope Company, well knowing the word "stopurkicken" was being used in the manner mentioned, and desiring to take advantage of the word "stopurkicken," as above described, printed and distributed throughout the city of St. Louis a large number of cards bearing the word "stopurkicken," and followed by the name of the Hesse Envelope Company. Because of this use of the word by defendant, Hesse Envelope Company, plaintiff avers it is damaged, and prays a recovery therefor.

It is said the word "stopurkicken" is an attractive misspelling and contraction of the phrase "stop your kicking," designed to excite public curiosity. It is obvious the petition states no cause of action against defendant, unless the word "stopurkicken" is either a trade-mark in which plaintiff enjoys a proprietary right or is possessed of a secondary meaning which by user has become a part of the good will of plaintiff's business; otherwise the word is *publici juris*, and available to every person desiring to employ it identically as is the original phrase of which it is a contraction. From the affirmative averments of the petition it is entirely clear plaintiff enjoyed no trade-mark in the word under consideration. Indeed, the cause does not proceed upon that theory. Plaintiff is engaged in the laundry business, which, of course, is that of washing and ironing for others. There is no suggestion in the petition that the word "stopurkicken" was in any manner annexed to plaintiff's wares or of the output of its laundry.

Infringement of a trade-mark consists in the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated. 38 Cyc. 741. The petition reveals that plaintiff had not yet employed the word in any manner so as to identify it with its business, for it says though a contract had been entered into between plaintiff and the D'Arcy Advertising Company for the use of the word, and it had been employed in blank space on signboards and on cards plaintiff had not yet revealed

its identity in connection therewith. Defendant is engaged in the manufacture and sale of envelopes, and used the word on an advertising card followed immediately by the name Hesse Envelope Company. These facts appearing as they do in the petition sufficiently disclose that no proprietary right as in trade-mark existed in the plaintiff in respect of the word "stopurkicken."

Not only must an exclusive proprietary right appear in the trade-mark, but the actual use of the trade-mark is essential as a means of identifying the origin, ownership, or manufacture of the goods of its proprietor, and, furthermore, such trade-mark must be annexed to and accompany the goods into the market to the end of their identification. See *Grocers' Journal Co. v. Midland Publishing Co.*, 127 Mo. App. 356, 366, 105 S. W. 310; 38 Cyc. 691, 692, 693. Unless the word or insignia relied upon is in some manner attached or affixed to the article in trade or stamped or inscribed thereon, it is not a trade-mark, and the maker of such article is without trade-mark rights concerning it. See *Oakes v. St. Louis Candy Co.*, 146 Mo. 391, 48 S. W. 467; *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305. It is entirely clear that defendant in using the word "stopurkicken" in connection with advertising its envelopes was not infringing upon plaintiff's laundry business, for the wares or commodities of the two companies are entirely dissimilar. But aside from this it appears affirmatively that the plaintiff had never used the word in connection with the output of its laundry. It had therefore obtained no proprietary right thereto by continued use through affixing it to the workmanship of its laundry turned out into the market.

For the same reasons, in part at least, no secondary right to the use of the phrase appears in plaintiff by user such as is essential to render it a portion of the good will of its laundry business as if reputation obtained thereon. It is certain that the case may not be sustained as one for unfair competition. Unfair competition consists in passing off or attempting to pass off upon the public the goods or business of one person as and for the goods or business of another. See Cyc. 756. Nothing less than conduct tending to pass off one man's goods or business as that of another will constitute unfair competition, for such is the very essence of the wrong on which the law affords redress to the injured party. See *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; 38 Cyc. 762, 763; 38 Cyc. 758. See, also, *Grocers' Journal Co. v. Midland Pub. Co.*, 127 Mo. App. 356, 367, 105 S. W. 310.

The relief in cases of unfair competition proceeds upon the theory that the words or phrase employed has by long use in connection with the goods or business of a particular trade come to be understood by the public as designating the goods or business of that particular trader. Because of such user the words or phrase become identified with the business of him who employs them and constitute a part of its good

will. Such meaning of the words or phrase, it is said, is the genesis of the law of unfair competition as distinguished from technical trademark, and therefore relief against unfair competition is afforded upon the ground that one who has built up a good will and reputation for his goods or business under a particular designation is entitled to the benefits therefrom. And secondary to this the theory is that the deception of the public injures the proprietor of the business by diverting his customers and filching his trade. *Grocers' Journal Co. v. Midland Pub. Co.*, 127 Mo. App. 356, 367, 105 S. W. 310; 38 Cyc. 760, 761, 763, 769.

It is to be observed that, though the right to complain as for unfair competition does not in every instance require the complainant shall have a proprietary right in the phrase, it does require that he shall have used it in his business as a means of identifying his goods as his product and for a sufficient length of time to establish a repute therefor in the market as pointing his product. *Grocers' Journal Co. v. Midland Pub. Co.*, 127 Mo. App. 356, 367, 105 S. W. 310; *Reach Co. v. Simmons Hardware Co.*, 155 Mo. App. 412, 135 S. W. 503; 38 Cyc. 769, 763. Unless the word or phrase involved has become a parcel of the good will of his business by continued user in connection with the product of the proprietor, it is entirely clear that the use of the same word by another does not reveal an unfair competition. *Shelley v. Sperry*, 121 Mo. App. 429, 99 S. W. 488.

The petition shows on its face that plaintiff had never used the word "stopurkicken" in connection with the output of its laundry, but on the contrary, only employed it on billboards and cards otherwise blank as an attraction to arouse the curiosity of the public with a view of revealing the name of the advertiser (plaintiff) thereafter. It is clear enough that though defendant interposed and used the same word on cards bearing its name, as it did, no unfair competition appears when considered in the sense of the law on the subject, and, until plaintiff had obtained a right thereto by actual user in connection with the product of its laundry, the contracted word "stopurkicken" must be regarded as publici juris and available to all who desired to employ it identically as was the original phrase "Stop your kicking." It is certain the D'Arcy Advertising Company had no superior right to either the phrase or the contracted word, and that it could confer none upon plaintiff by its contract to employ it as a means of arousing the curiosity of the public for plaintiff's benefit. *Reach v. Simmons Hardware Co.*, 155 Mo. App. 412, 135 S. W. 503. Though persons who have acquired a right in respect of words and phrases by user as above indicated may assign or contract such right to another in conjunction with the good will of the commodity the identity of which they point, it is obvious that an advertising agent may not appropriate any word or phrase he chooses by merely seizing it out of our vocabulary and confer an exclusive right thereto on another by a contract to employ it in

aid of his business. We are advised of no principle of our jurisprudence on which the judgment in this case may be sustained, and the counsel for plaintiff have omitted to file a brief suggesting one.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

SECTION 4.—THE UNIQUENESS OF HIS GOODS OR SERVICES

HASKINS v. RYAN

(Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 575, 64 Atl. 436.)

Suit by Harry C. Haskins against Thomas F. Ryan. Heard on demurrer to bill. Bill dismissed.

STEVENS, V. C. To the bill in this case a general demurrer is pleaded. The bill alleges, in substance, that during the years 1898, 1899, 1900, and 1901 the complainant devoted a large part of his time to the study of industrial conditions connected with the output of pig lead in the United States, and had conceived the plan of uniting the outstanding lead interests, which had not already become a part of the National Lead Company, into one company, and had either procured options thereon or had opened negotiations for their purchase; that in the spring of 1901 "he had crystallized and formulated a complete plan for the combination of the white lead industries in the United States not already in the National Lead Company; that he laid such plan before the defendant, a capitalist; that he sought his co-operation and aid, and himself agreed to contribute, if necessary, as much as \$200,000, if the defendant would join him therein, and also contribute enough to carry the enterprise through."

The bill alleges, further, that defendant, to quote from the bill, "expressed a willingness to join your orator therein, provided an examination of the plan and papers by the attorneys and experts of said Ryan [the defendant] confirmed the statements of your orator made to him." The bill then alleges that the complainant submitted the plan to Ryan's attorney, and was subsequently told by him that he had submitted it to Ryan, and had indorsed it "as comprehensive, feasible, and attractive"; that through the efforts of Ryan's agents options had been obtained upon most, if not all, of the properties upon which the complainant had options, and that on January 20, 1903, the United Lead Company was organized as a corporation under the laws of New Jersey, and under the direction and control of Ryan proceeded to acquire and now owns the interests in nearly all the companies, firms, and individuals named in complainant's plan, and is capitalized with a

capital stock of \$15,000,000 and has issued bonds for \$17,000,000; that in the formation and exploitation of this company the defendant, Ryan, "has made an enormous profit, the amount of which is unknown to complainant," and that a combination substantially as planned by complainant has taken place, or is about to take place, with the result of great profits to said Ryan.

The bill then charges that Ryan's act of availing himself of the information complainant had collected and had only disclosed to Ryan "upon the agreement and understanding on the part of the said Ryan that he would join your orator in the said scheme and share with him in the profits arising therefrom is contrary to equity"; but I do not understand that by this general charge it is intended to allege any other understanding or agreement than that contained in the stating part of the bill, viz., that Ryan had expressed a willingness to join complainant in his project, provided an examination of it by Ryan's attorneys and experts should confirm complainant's statements. The bill asks for a discovery and account of Ryan's profits and a decree that complainant is entitled to a share of them. Ryan is the sole defendant.

It is perfectly plain that no recovery can be had in this case on the basis of a completed agreement broken by Ryan. The plan, a copy of which is appended to the bill contemplates the raising of \$15,000,000 for the purpose of acquiring the properties of the various concerns, 22 in number, other than that of the National Lead Company. The raising of a fund with which to purchase these properties was of the essence of the plan, but complainant had not bound himself to contribute any definite sum, and Ryan had not bound himself to contribute anything. Even if, without direct averment, we should infer that an examination of the plan and papers had been made by Ryan's experts, and that such examination confirmed complainant's statements to Ryan, nothing more is shown than that Ryan agreed to join in the plan; that is, agreed to enter into a definite and explicit agreement on the subject. But nothing is better settled than that equity will not compel the specific performance of an agreement to make an agreement. *Lane v. Calvary Church*, 59 N. J. Eq. 413, 45 Atl. 702 (affirmed on appeal). An account on the basis of a completed agreement is, therefore, quite out of the question.

As I understand the complainant's argument, he does not rest his case on any such basis. His contention is this: "The plan is my property. The defendant has appropriated it to his own use. I claim an account of the profits arising from its appropriation." If, in point of fact, the plan has been wrongfully taken or appropriated, the remedy, if any, would appear to be an action on the case for damages; the amount of damages being its fair value. But the plaintiff does not, and in this court could not, demand damages. He asks for a discovery and an account of profits. The fact that he has not been able to cite any pre-

edent for the claim he makes is not, of itself, conclusive, if he can bring himself within the principle upon which an account is given.

The complainant has, undoubtedly, the right to claim protection in this court for his manuscript. It would seem that, without any reference to whether the plan is or is not open to the objection that it seeks to create a monopoly (Kerr on Inj. p. 186; *Oliver v. Oliver*, 11 C. B. [N. S.] 139), he would have the right to restrain its publication or to prevent its use; and, in the case of an author the law does more than protect the manuscript, regarded as a material thing of ink and paper. The combination of words of which it is composed (whether written down or acted, or sung before an audience admitted on payment of a fee) is also protected, and publication is restrained, even if the manuscript be destroyed and an attempt be made to reproduce it from a copy rightfully in the possession of another, or even from memory. The work is protected indefinitely before publication by the common law (*Aronson v. Baker*, 43 N. J. Eq. 366, 12 Atl. 177; *N. J. State Dental Ass'n v. Denticura Co.*, 57 N. J. Eq. 594, 41 Atl. 672; *Denticura Co. v. New Jersey State Dental Soc.*, 58 N. J. Eq. 582, 43 Atl. 1898), and for a limited time after publication by the statutory law of copyright. The law has never attempted to go beyond this, and to enjoin, for the benefit of the author, after publication, the use of the ideas contained in his work.

In the case of secret processes of manufacturing, the law does, to a certain extent, enjoin the use of ideas. It would, of course, on the same principle on which it affords protection to the unpublished manuscript in the hands of the author, enjoin the publication or exhibition of the paper containing the formula; but it does more. In enjoining the use of the formula, it restrains the wrongdoer from putting the idea formulated to practical account. *Stone v. Grasselli Co.*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794. The protection ends when the secret becomes known. In the case of patent rights the statute goes still further. It affords protection for a limited period to a certain class of ideas, known as "useful inventions," after the inventor has published them to the world, and because he has so published them. The valuable right here protected is not, as in the case of copyright, the manuscript or writing, regarded as a peculiar combination of words or figures, but the idea or conception to which those words or figures give rise, so far as that idea or conception may admit of material embodiment. If the idea contained in the patented device of A. suggests to the mind of B. another idea, which would not have arisen in the mind of B. but for the stimulus of the prior idea, A. can claim no property in that, and yet B. has mentally appropriated A.'s idea and made it the basis of his own; and I do not suppose that it has ever been contended that the entire public are not at liberty to subject A.'s idea to such investigation and discussion as it may desire. The wrong does not commence until the attempt is made to make or dispose of its material embodiment.

I now come to the precise question here involved. It is this: Has the complainant a property right in the scheme or idea to be found in his plan, as contradistinguished from the property right which he has in his manuscript, regarded as a combination of words and figures—a thing of ink and paper? A right is defined to be that interest which a person actually has in any subject of property, entitling him to hold or convey it at pleasure. But that can hardly be styled “property” over which there is not some sort of dominium. Now, as I have already said, the combination of words and figures contained in complainant’s plan belongs to him absolutely. Its publication or reproduction or exhibition in any form may be enjoined. But the idea contained in the plan differs from the ideas to which I have already called attention in this important respect: It involves the voluntary action and co-operation of many different men. When I say voluntary action, I mean action not restrained by contract; for the allegation that complainant had “options” is altogether too vague to warrant an inference that they are still subsisting, or that complainant had the means of availing himself of them without the aid of outside capital. Besides, the allegation is, not that he has procured options on all the properties which it was proposed to combine, but that he either had options on them or had “opened negotiations for their purchase.” The means of carrying out the plan, of giving effect to the idea, lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called “property.” It lacks that dominium, that capability of being applied by its originator to his own use, which is the essential characteristic of property. It differs fundamentally from the secret process or patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now, it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys v. Boosey*, 4 H. L. Cas. 965: “‘*Volat irrevocabile verbum*,’ whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. * * * He has produced the thought and given it utterance, and eo instante it escapes his grasp.”

Justice Yates, in his dissenting opinion in the great case of *Millar v. Taylor*, 4 Burr. 2302, 2366, an opinion which was afterwards concurred in by the House of Lords, said: “Where are the indicia or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no earmarks upon them.” A case much like the present is that of *Bristol v. Equitable Assurance Society of New York*

(Sup.) 5 N. Y. Supp. 131; Id., 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568. There the complainant confidentially disclosed to the president of a life insurance company a system of soliciting life insurance devised by him. It was alleged that the company, after the disclosure, used the plan without complainant's consent. On demurrer, it was held that the plaintiff could not recover for the alleged use. I am therefore of opinion that complainant has no property right in his plan regarded as an idea. Having no property right, he has no right to an account.

But, if a court of equity cannot treat complainant's idea as property, it is also incapable of giving him the remedy of account on another ground. The charge of the bill is that Ryan should account for complainant's share of any profits reaped by him from or in connection with the promotion and exploitation of the United Lead Company. Now, what profits could the defendant reap therefrom? The suggestion is that he might reap the profits of a promoter. A promoter may sometimes get shares, not issued for money or property purchased. Such shares, viewed from a legal standpoint, are not of much value. But he may also get, by contract, fully paid shares. It is presumably of such shares that the complainant desires an account. Now, on what basis could there be an equitable division of such shares? The complainant charges that it was part of his plan personally to contribute up to \$200,000, if necessary. He has in fact contributed nothing. The plan contemplated the raising of \$15,000,000. Ryan's interest in the company would depend in part upon the extent to which he had himself contributed, and in part upon other considerations having no relation to complainant. This being so, it would seem to be utterly impossible, on any recognized basis of apportionment, to take from Ryan a part of his shares and give them to complainant.

Complainant, no doubt, expected to secure shares, partly in return for the money to be put in by him and for the services to be performed by him, and partly for the prior work done in formulating the scheme. How much his collaborateurs in the undertaking, had they taken him in, would have allowed him for what he had done, or would do, is altogether conjectural. It would naturally have been a matter of express contract. I am quite unable to see how a court of equity could make him an allowance by way of account of profits, based upon a condition of affairs wholly unanticipated and wholly unprovided for. Manifestly, the only way of compensating him on any rational basis would be to ascertain what his plan was reasonably worth and then to give him damages. This, of course, would presuppose a property right in the plan. Conceding such right, the damages, if recoverable at all, would be recoverable in a court of law in an action on the case, and not in equity.

I think the complainant's bill should be dismissed.

FONOTIPIA LIMITED v. BRADLEY.

(Circuit Court of the United States, 1909. 171 Fed. 951.)

CHATFIELD, District Judge.²⁰ The present cases have been heard upon a record consisting of pleadings and affidavits presented originally upon a motion for preliminary injunctions and by stipulation made the record and testimony on final hearing. The two actions involve substantially the same principles and can be disposed of together, the slight differences between the positions of the parties, and certain questions peculiar to the allegations of each complainant, being capable of statement and determination in connection with the main issues, which are alike in the two suits.

The complainants at the present time are producing and putting upon the market records of vocal and instrumental music, for use upon machines for the reproduction of sound, and constructed in a form suitable for operation with these records in the flat and circular or disc form described in the patent to Berliner, No. 534,543, February 19, 1895 (Victor v. Amer. Grapho. Co., 145 Fed. 350, 76 C. C. A. 180), and Jones, No. 688,739, December 10, 1901 (Amer. Grapho. Co. v. Universal Co., 151 Fed. 595, 81 C. C. A. 139). * * *

The discs themselves, as at present made, are of some such substance as hard rubber, and are said to be made by causing the music to be sung or played into a receiving instrument, which records the waves of sound upon a disc properly prepared, which, in turn, by an electroplating process, is used to yield a matrix of metal. From this matrix numberless reproductions, substantially duplicates even in minute details of the original record, are produced by processes perfected by each company, and these reproduced discs, when used upon the talking machine or graphophone, turn back, by means of the diaphragm of the instrument, the lines of the record into sound waves, which are the equivalent of those originally sung or played. * * *

The defendant has been connected with the business of selling phonographs and sound producing machines for a number of years. He is shown by the record to be more or less familiar with the business and to be at present acting as sales agent for a corporation called the Continental Record Company, which is stated in the papers of incorporation to have its home office at New Baltimore, N. Y. * * *

The defendant has been for some months advertising by circular letter and in other ways his ability to sell records of the Continental Record Company, stating in these advertisements that the records are sold at prices not more than half those now charged for the original records. The advertisements claim that the records themselves are pressed upon the very highest class of material finished equal to the original, that the character of the record itself is identical with the original

²⁰ The opinion of the court has been abridged by numerous omissions.

record, and that experts who have listened to samples are unable to determine between the original and the copy. The catalogue contains a statement that the records offered by Bradley are "all duplicates from the original records made by the artists whose names are used herein."

It is apparent from the explanation which has been already made that the commercial records sold by the complainants are copies or duplicates, in the sense that they are made from a matrix or metallic plate, but are in no sense duplicate originals; that is, actually made by the sound waves of the singer at the time of the original song. In this sense the defendant's records, if made from one of the commercial records of the complainants, may be a duplicate in the sense of being an exact reproduction, even to such peculiarities as noticeable marks in the lines upon the disc and in the position and relative location of those marks or lines; but the defendant's records are not duplicates, even in the sense that they are removed from the original singing by but one reproduction from a matrix. The testimony shows that the defendant the Continental Record Company makes its records from commercial discs of the complainants and must produce a second matrix before the copies can be pressed or stamped. The testimony does not show that the complainants themselves confine their sales entirely to records that have but one matrix between the commercial discs and the original singing; but the testimony does show that the uniformity of the product and the carefulness of construction renders a disc placed upon the market by the complainants substantially equal to the record made at the original singing, and is thus separated from it by but one matrix or reproducing process. * * *

It would seem to be true, in a sense (and the evidence tending to show likeness between the original records of the complainant companies and the particular records sold by the defendant only accentuates this testimony), that the records put upon the market by the defendant have been made, through some transmutation, from original songs sung under contract by the artist to whom the disc is accredited, and to whom a royalty is being paid by one of the complainants, and with whom the defendant has no contractual or business relations whatever. In such case it is impossible to hold that the public is being deceived in the representation that the original song, from which the matrices and reproductions were derived, was sung by the artist to whom it is accredited. Certain mistakes in labeling are shown; but these are merely evidence of the way in which the work was done, rather than sufficient grounds for decree by themselves. Nor is there sufficient similarity to hold, as has been said, that the discs sold by the defendant are in appearance sufficiently like any other discs of the complainants as to bring them within the case of *Victor Talking Mach. Co. v. Armstrong et al.*, *supra* [132 Fed. 711].

But a more serious question comes from the testimony offered by the discs presented in the case themselves. If the defendant is selling to customers records reproduced by processes of the Continental Record Company, by means of discs purchased in the market by that company for the purpose, and if he advertises and guarantees to his customers that the Continental records are duplicates equal in all respects, including composition and finish, and that it is impossible to distinguish between the Continental records and those produced by the complainants, we have a question of fact presented in which the public is interested, namely, do the records submitted as evidence in the case lead to any determination upon the question of deception or imitation of the product, and the resultant benefit to the imitator, with corresponding injury to the imitated, by the results of the sales, and by the effect upon future sales if the product of the imitation be unsatisfactory?

It may be argued that the imitation would go out of the market and be removed from interference with the original if the product proved unsatisfactory; but it would seem that business reputation and excellence of product are entitled to some protection from imitations which discourage further use and prove unsatisfactory as a whole, because the result of the sale of such a product must necessarily affect adversely the opinion of the very class of customers which is sought to be enlarged by the sale of a satisfactory product.

A comparison, in order to observe points of similarity between the records put in evidence by the complainants, and made by themselves, with the records produced by the defendant and introduced as purchases from him, leads irresistibly to the conclusion that the material used in the Continental Record Company's discs is greatly inferior, contains imperfections which cause scratchings and irritating sounds, is subject to warp, and is so much softer or destructible in character that the commercial value of the defendant's records is much less than that of the complainant companies' records. Actual comparison of the discs warrants the finding that the Continental records are not in every way the equal, even when played upon the same machine, of the complainants' records, and it is impossible to hold that they are duplicates in the sense that they cannot, in most cases, be distinguished from the genuine, or that the imitation product is the duplicate in the sense of being the equal of the original. The defendant's records do not show the use of as good material in the discs, nor as much durability and freedom from warping as those of the complainants, and a comparison shows in many instances a dulling or far away effect in the defendant's discs. * * *

But, as has been already said, the question of imitation of trademark cannot control the present case and we must therefore consider the broad question presented by the issue, namely, whether the taking of property in the shape of valuable ideas and products, by mechan-

ical imitation or reproduction, is susceptible of notice by a court of equity, and whether any remedy therefor can exist apart from the questions of patent, trade-mark, and intentional deception or imitation and deceitful substitution of the product. * * *

We therefore reach the broad question of the power of a court of equity to secure to an individual by injunction the full enjoyment of both corporeal and incorporeal rights in property created by him or at his expense, and capable of a taking by another, where such taking either diminishes or destroys the enjoyment of those rights by the owner and diverts a part of the enjoyment or profits from the rights to the one complained of. * * *

No case cited and decided strictly upon the question of unfair competition, so far as called to the attention of the court, has ever granted relief in instances outside of imitation or deception, and where the public would be likely to be misled by the points of similarity involved; but equity has granted relief in certain typical lines of cases where the doctrine of unfair competition seems to have been the guide to the decision, but where the basis upon which the relief was granted was the unfair taking of the complainant's property, rather than the deception of the purchaser, or the imitation of a patented or copyrighted article, or a registered trade-mark or trade-name.

In the cases of *National Tel. News Co. et al. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, and *Illinois Commission Co. et al. v. Cleveland Tel. Co. et al.*, 119 Fed. 301, 56 C. C. A. 205, the dissemination of market news by a tape ticker was held not to be copyrightable; but the court determined that the business was lawful and involved the use of property which included intangible rights which were capable of illegal or inequitable appropriation and use by another party. The service of news by means of such a tape ticker was protected, and the further sale of the items of news given to the public by the ticker service was enjoined, apparently upon the theory that the appropriation of such property was the taking of that property from the person entitled to the enjoyment thereof. These cases were substantially approved by the Supreme Court of the United States in *Board of Trade v. Christie Grain & Stock Co.*, *supra*, and the court says: "The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's"—comparing *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460.

And while the approval by the Supreme Court of the United States in this particular case seems to have been specially given because the acts complained of therein induced a breach of trust, it is difficult to see any distinction between the questions involved in the present litigation and that in the stock-ticker cases.

Another line of cases involving somewhat similar determinations are known as the "ticket-scalper cases," such as *Bitterman v. Louisville & N. R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, affirming *Louisville & N. R. Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192; *Penna. Co. v. Bay et al.* (C. C.) 150 Fed. 770; *Illinois Central R. R. Co. v. Caffrey et al.* (C. C.) 128 Fed. 770; *Nashville, C. & St. L. Ry. Co. v. McConnell et al.* (C. C.) 82 Fed. 65; and also the trading-stamp cases, *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800; *Same v. Louis Weber & Co.* (C. C.) 161 Fed. 219, and cases therein cited.

In the ticket-scalper cases injunctions were granted, not because the purchasers of tickets were deceived by imitation or fraudulent tickets, but because the railroads issuing the tickets were injured by the trade in tickets obtained from them under special contracts, and then sold to other individuals who were not entitled to enjoy those contracts. In the trading-stamp cases, relief was granted, not to the extent of holding that trading stamps could not be transferred, nor upon the ground that persons obtaining trading stamps were being defrauded by a transfer of the right to redeem, but on the theory that the use of trading stamps as premiums, for the sake of soliciting trade by persons not parties to the original contracts under which the Sperry & Hutchinson Company agreed to issue the tickets, was a wrongful appropriation of property rights belonging to the Sperry & Hutchinson Company.

The present case is extremely like these just considered in principle. It is almost as if the court should be asked to enjoin individuals from theft, upon the ground that the criminal statutes did not make the taking of the particular kind of property in question larceny, and in cases where equitable relief was therefore appealed to because of the absence of any adequate remedy at law.

The principle involved is far-reaching, especially in that it carries the scope of equitable jurisdiction into matters frequently considered to be purely the result of business competition, and which, even if in themselves morally or financially wrong, are supposed to be without remedy where no contractual relations have existed from which suits for damages could arise. Various statutes have been passed in an attempt by legislation to protect certain classes of rights, such as the recording acts of the various states, and the lien laws of different jurisdictions. The patent, trade-mark, and copyright laws of different governments and the history of legislation as well as law, prove that where an act is admittedly wrong in the eyes of the public, and where the interests of individuals are being interfered with by commissions of the acts in question, legislation in the appropriate jurisdiction usually follows, and a legal remedy is created; but such legal remedies must be with relation to a specific class of acts.

The jurisdiction of a court of equity has always been invoked to

prevent the continuance of acts of injury to property and to personal rights generally, where the law had not provided a specific legal remedy, and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly, in certain kinds of cases, be protected by legislation; but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply. The so-called "common-law right" in literary property before its publication has long been recognized in the law. After the passage of legislation, literary property was secured, even in the published article, by the various copyright statutes of the different nations. When such a copyright statute has been passed, all property rights in the published article must be secured and controlled by strict compliance with the statute.

It has been held that under the copyright law in effect prior to the 1st day of July, 1909, musical compositions, unless transcribed in print or musical characters, upon paper, were incapable of copyright (*White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655). Since the beginning of the present action, the copyright law has been amended, and since the 1st day of July, 1909, any form of recording or transcribing a musical composition, or rendition of such composition, has been capable of registration, and the property rights therein secured under the copyright statute (Act March 4, 1909, c. 320, 35 Stat. 1075).

It would seem therefore that the questions raised in the present case may be avoided as to future compositions by copyrighting the original rendition of the song, provided the singer has the right to use it for that purpose, and the disc record by which the rendition is preserved; but question will still remain as to the records produced prior to the present copyright law, and serious discussion may arise over the right obtained, for instance, by a grand opera singer who files a copyright for the resinging of a song already recorded by him or her, and sold to the public upon a disc record. With that we have nothing to do here, and the relief asked in this case would protect those who have already sung or played compositions having a pecuniary value, because of their musical excellence, and also the persons who have invested capital and labor in putting a valuable product upon the market. The education of the public by the dissemination of good music is an object worthy of protection, and it is apparent that such results could not be attained if the production of the original records was stopped by the wrongful taking of both product and profit by any one who could produce sound discs free from the expense of obtaining the original record.

It has been said in the case of *American Washboard Co. v. Sag-*

inaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; that the basis of recovery is the damage to property rights of the complainant, rather than the deception of the public. It is from this contended: The better the imitation, the greater reason there is for issuing an injunction. And, in the sense that the marketable qualities of an article can be appropriated by a good substitute, this statement is true; but it necessarily follows that the injury to reputation and to the demand for the article would be greater if the imitations do not prove satisfactory, and there be no way of informing the public that the genuine is preferable or superior. In the case of sound discs such as those involved in the present action, a careful comparison of the records is necessary to emphasize the superiority of the discs made with better material, more careful and experienced workmanship, and improved methods; and it is also evident that to the untrained ear such differences cannot be carried in mind and appreciated, unless the opportunity for direct comparison be immediately present. An actual playing of the discs introduced as evidence in this case illustrates the point involved, for the testimony and also experiments show that in some cases the records sold by the defendant are with difficulty distinguished from those sold by the complainant, unless one is played immediately following the other and under the same circumstances, so that comparison would fair.

Reference has been made to the rights of a photographer who should make a film for moving pictures, of some historical or unique occasion, and should sell the film to parties who should reproduce it in a moving-picture machine. Other parties might make pictures from the film, or from the exposures, and a question, in some respects, similar to the present, might be involved. A dressmaking establishment might employ high-priced designers, and their product might be copied, and the designs thus appropriated. Architects might build houses and utilize extremely valuable methods and ideas, and others building houses might follow these ideas. Sculptors might carve statues of great commercial value, and stone carvers might copy these sculptures.

It cannot now be determined how far such appropriation of ideas could be prevented; but it would seem that where a product is placed upon the market, under advertisement and statement that the substitute or imitating product is a duplicate of the original, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief.

That is the particular proposition presented in the present case, and to that extent it seems to the court that the principles applied in the stock-ticker and similar cases above recited should be followed, and relief by injunction granted.

MONTEGUT v. HICKSON, Inc.

(Supreme Court of New York, 1917. 178 App. Div. 94, 164 N. Y. Supp. 858.)

Action by Sylvie Montegut and Jeanne D'Etreillis, doing business as Boue Sœurs, against Hickson, Incorporated. From an order granting plaintiffs' motion for judgment on the pleadings, defendant appeals.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, DAVIS, and SHEARN, JJ.

SHEARN, J. In the case of *Burrow v. Marceau*, 124 App. Div. 665, 109 N. Y. Supp. 105, Mr. Justice Ingraham, writing for a unanimous court, said: "There is no hard and fast rule by which it can be determined when the court will interfere by injunction to prevent what is practically a fraud upon a person engaged in business by the unfair methods of competition. Each case must depend upon its own facts; but where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect the honest trader and restrain a dishonest one from carrying out his scheme."

Although the facts in that case are wholly dissimilar from the facts in the case at bar, the principle thus broadly and tersely stated is one which should be decisive of this case. In the opinion of Mr. Justice Davis it is said: "Nor do I think that the deception by means of which the defendant obtained possession of plaintiffs' models affects the question."

To my mind, under the principle correctly laid down in the *Burrow* Case, *supra*, and under the law of unfair competition as generally understood, the deception employed is the very heart of the matter. It must be conceded that, if the defendant obtained possession of plaintiffs' models by bribing one of plaintiffs' employés to furnish surreptitiously an opportunity to copy them, the means employed would constitute unfair trade. *Tabor v. Hoffman*, 118 N. Y. 31, 23 N. E. 12, 16 Am. St. Rep. 740. While the case supposed involves a violation of the duties growing out of the relation of master and servant, the resort to bribery is not condemned because it causes the servant to violate his duty to his master, but because it is an unfair and dishonest trade practice.

I agree that the defendant has a legal right to copy and to sell as its own creations the exclusive models designed by the plaintiffs, if the models or an inspection of the models are procured by fair means; but I deny the right of the defendant to obtain plaintiffs' trade by resort to fraud and deception practiced upon the plaintiffs at the instigation and hiring of the defendant. Paraphrasing the opinion of Judge Vann in *Tabor v. Hoffman*, *supra*: Because an inspection of or possession of plaintiffs' models may be possible by fair means, it does not

justify obtaining the same by unfair means. Here the defendant, not only obtained possession of the exclusive artistic creations of the plaintiffs by fraud and deception, but physically removed therefrom the plaintiffs' trade-mark, exhibited the gowns to its customers, and represented them to be its own importation, created by persons other than the plaintiffs. The natural and intended result was to divert from the plaintiffs and appropriate by the defendant trade and custom that would otherwise go to the plaintiffs; for, if the styles were popular and could only be obtained at the plaintiffs' establishment, the defendant could only obtain the custom of persons seeking these styles by obtaining the models and copying them. For this express purpose, and knowing that plaintiffs would only sell copies of these models to bona fide customers purchasing for personal use, the defendant conceived and put into effect its scheme of imposition and fraud upon the plaintiffs, by procuring a person to misrepresent herself as a private customer, buying the gowns to wear herself, and thus misled and deceived the plaintiffs into turning over their models to the defendant. We are not concerned with the fraud practiced by the defendant on its own customers, except in so far as it tends to brand the entire transaction and trade methods of the defendant as dishonest and fraudulent.

While the relief asked for in the complaint is too broad, in my opinion plaintiffs are entitled to a judgment, assuming the allegations in the complaint to be true, enjoining the defendant from exhibiting and selling gowns and capes which are copies of those obtained from the plaintiffs by means of fraud and deception, and therefore the order granting plaintiffs' motion for judgment on the pleadings should be affirmed, with \$10 costs and disbursements, with leave to defendant to withdraw the demurrer and to answer, upon payment of costs in this court and in the court below. Order filed.

LAUGHLIN and DOWLING, JJ., concur.

DAVIS, J. (dissenting). The defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. Upon these pleadings the court granted plaintiffs' motion for judgment.

The complaint alleges that the plaintiffs are engaged in business as high grade dressmakers at 13 West Fifty-Sixth street, New York City, and at 9 Rue de la Paix, Paris, under the name of "Boue Sœurs," with the most exclusive clientèle; that the establishment of the plaintiffs has an international and enviable reputation for the creation of exclusive models and styles; that these models and styles are created in Paris at great expense and after much experimenting; that they are brought by plaintiffs to their establishment in New York City, where they exhibit them to their patrons as their own creations and exclusive models; that these models consist of gowns, capes, and apparel, and bear the mark "Boue Sœurs," thereby insuring exclusiveness of design and the highest quality of material.

The complaint proceeds to allege that defendant is a dealer in gowns at 661 Fifth avenue, New York City, and that the defendant, well knowing the reputation of the plaintiffs for creating exclusive models, which become the standard for prevailing styles, for the purpose of unlawfully securing to itself the benefits and advantages incident to the exhibition and sale of the artistic creations of the plaintiffs, by palming off the same as its own importations, in October, 1916, caused certain of the plaintiffs' own exclusive gowns and a cape to be purchased from the plaintiffs by a lady who represented herself to be a private customer, buying the gowns for her personal use, which representations were believed by the plaintiffs to be true and relied upon by them, although the said representations were false; that the said gowns and cape were delivered to the said purchaser, who in turn delivered them to the defendant, Hickson, Incorporated; that thereafter the defendant, Hickson, Incorporated, took out from said gowns the marks "Boue Sœurs," and exhibited and are exhibiting the gowns and cape, and copies thereof, to its customers, and represented and are representing the gowns and cape to be their own importations, and to be the creations of certain alleged dressmakers in Paris, France, other than the plaintiffs, and said Hickson, Incorporated, exhibited and offered to sell, and is continuing to exhibit and offering to sell, to its customers said gowns and cape, and copies thereof, thereby deceiving the public, injuring the reputation of the plaintiffs' firm, causing it to lose sales, and making customers of the firm suspicious of plaintiffs' representations, all to the plaintiffs' great damage.

Plaintiffs then demand judgment restraining defendant from exhibiting and selling said gowns and capes, or copies thereof, and from making any representation as to the origin thereof, except that they are the creation and styles of the plaintiffs, and for \$25,000 damages.

The plaintiffs claim that the defendant is engaging in unfair competition and dishonest trade methods, causing direct injury to plaintiffs' business. The question of patent or copyright is not involved in this case, as the plaintiffs' models are neither copyrighted nor patented.

The plaintiffs ask the court to enjoin their competitor, the defendant, from exhibiting and selling those models and designs, and copies thereof, as its own production, it having obtained possession of them for that purpose by false representations as to the purpose for which it bought them.

This is not the usual case of misrepresentation, where a person offers for sale his own creations under the marks or labels of another. Here the defendant removed from the purchased models every mark serving to identify them as those of the plaintiffs. It is a case of copying and selling the creations of the plaintiffs, by representing them to be the product of the defendant's own invention, or that of persons other than the plaintiffs.

We may assume that the plaintiffs sell their models and copies thereof to the public generally, endeavoring as far as possible to avoid selling them to their competitors. When once sold, the plaintiffs retained no right to control the use to be made of them. If the purchaser chooses to represent himself as the creator of the models, and sell copies of them to the public, it is an act which a court of equity will not restrain. While the defendant's act of appropriating the ideas and work of the plaintiffs may be unreservedly condemned in its moral aspect, it is not an act which the courts have thus far regarded as unfair competition. Nor do I think that the deception by means of which the defendant obtained possession of plaintiffs' models affects the question.

If the charge of deception, as alleged, be true, and we assume it to be true for the purpose of this appeal, while it reflects seriously upon the character of the defendant as a merchant, the deception practised does not affect its right to full control over the models it bought, including the selling of copies, the suppressing of the fact that they are the creations of the plaintiffs, and the holding of them out as the product of the defendant's own taste and experience.

For these reasons, the order appealed from should be reversed, and the motion for judgment on the pleadings denied.

CLARKE, P. J., concurs.

INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS.

(Supreme Court of the United States, 1918. 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit in equity by the Associated Press against the International News Service. An order of the District Court, granting a preliminary injunction (240 Fed. 983), was modified by the Circuit Court of Appeals (245 Fed. 244, 157 C. C. A. 436), and defendant brings certiorari.

Mr. Justice PITNEY delivered the opinion of the Court.

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (Laws N. Y. 1901, c. 436). Complainant gathers in all parts of the world, by means of various instrumentalities

of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to \$3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than \$2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or earlier than similar information can be furnished to competing newspapers by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer:

"Prompt knowledge and publication of worldwide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business."

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employes of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and, third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The District Court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads, but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was one of first impression it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. 983, 996. Both parties having appealed, the Circuit Court of Appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause, with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. 245 Fed. 244, 253, 157 C. C. A. 436. The present writ of certiorari was then allowed. 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528.

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United States. Complainant's news matter is not

copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, according to complainant's contention, news is not within the operation of the copyright act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act be complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news of any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the Circuit Court of Appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived. See Equity Rules 38, 43, 44 (33 Sup. Ct. xxix, xxx).

In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is

the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917) pp. 7, 14, 16, 17.

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (Const. art. 1, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and cir-

cumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. See *Morison v. Moat*, 9 Hare, 241, 258. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*In re Sawyer*, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402; *In re Debs*, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (*Truax v. Raich*, 239 U. S. 33, 37-38, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; *Brennan v. United Hatters*, 73 N. J. Law, 729, 742, 65 Atl. 165, 9 L. R. A. [N. S.] 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

The question, whether one who has gathered general information or news at pains and expense for the purpose of subsequent publication through the press has such an interest in its publication as may be protected from interference, has been raised many times, although never, perhaps, in the precise form in which it is now presented.

Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be

restrained from getting at the knowledge by inducing a breach of trust.

In *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, the Circuit Court of Appeals for the Seventh Circuit dealt with news matter gathered and transmitted by a telegraph company, and consisting merely of a notation of current events having but a transient value due to quick transmission and distribution; and, while declaring that this was not copyrightable although printed on a tape by tickers in the offices of the recipients, and that it was a commercial not a literary product, nevertheless held that the business of gathering and communicating the news—the service of purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business world, and partaking of the nature of property in a sense that entitled it to the protection of a court of equity against piracy.

Other cases are cited, but none that we deem it necessary to mention.

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.

The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York, and because of this, and of time differentials due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members

communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur. § 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of com-

plainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibited if the reward were to be so limited. No single newspaper, no small group of newspapers, could sustain the expenditure. Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. The practical needs and requirements of the business are reflected in complainant's by-laws which have been referred to. Their effect is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures.

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles, but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim "*sic utere tuo*," etc.

It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. *Howe Scale Co. v. Wyck-off, Seamans, etc.*, 198 U. S. 118, 140, 25 Sup. Ct. 609, 49 L. Ed. 972. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own

goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived.

The doctrine of unclean hands is invoked as a bar to relief; it being insisted that defendant's practices against which complainant seeks an injunction are not different from the practice attributed to complainant, of utilizing defendant's news published by its subscribers. At this point it becomes necessary to consider a distinction that is drawn by complainant, and, as we understand it, was recognized by defendant also in the submission of proofs in the District Court, between two kinds of use that may be made by one news agency of news taken from the bulletins and newspapers of the other. The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. This form of pirating was found by both courts to have been pursued by defendant systematically with respect to complainant's news, and against it the Circuit Court of Appeals granted an injunction. This practice complainant denies having pursued and the denial was sustained by the finding of the District Court. It is not contended by defendant that the finding can be set aside, upon the proofs as they now stand. The other use is to take the news of a rival agency as a "tip" to be investigated, and if verified by independent investigation the news thus gathered is sold. This practice complainant admits that it has pursued and still is willing that defendant shall employ.

Both courts held that complainant could not be debarred on the ground of unclean hands upon the score of pirating defendant's news, because not shown to be guilty of sanctioning this practice.

As to securing "tips" from a competing news agency the District Court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals (245 Fed. 247, 157 C. C. A. 436) found that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no

difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information. In *Kelly v. Morris*, L. R. 1 Eq. 697, 701, 702, Vice Chancellor Sir William Page Wood (afterwards Lord Hatherly), dealing with such a case, said that defendant was "not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained."

This was followed by Vice Chancellor Giffard in *Morris v. Ashbee*, L. R. 7 Eq. 34, where he said: "In a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road."

A similar view was adopted by Lord Chancellor Hatherly and the former Vice Chancellor, then Giffard, L. J., in *Pike v. Nicholas*, L. R. 5 Ch. App. Cas. 251, and shortly afterwards by the latter judge in *Morris v. Wright*, L. R. 5 Ch. App. Cas. 279, 287, where he said, commenting upon *Pike v. Nicholas*: "It was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book."

A like distinction was recognized by the Circuit Court of Appeals for the Second Circuit in *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, and in *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 838, 100 C. C. A. 303.

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items

published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled.

There is some criticism of the injunction that was directed by the District Court upon the going down of the mandate from the Circuit Court of Appeals. In brief, it restrains any taking or gainfully using of the complainant's news, either bodily or in substance from bulletins issued by the complainant or any of its members, or from editions of their newspapers, "*until its commercial value as news to the complainant and all of its members has passed away.*" The part complained of is the clause we have italicized; but if this be indefinite, it is no more so than the criticism. Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the District Court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose.

The decree of the Circuit Court of Appeals will be Affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

Mr. Justice HOLMES, dissenting.

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them—in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation

that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained in that way. Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's, but the same evil may follow from the opposite falsehood—from saying whether in words or by implication that the plaintiff's product is the defendant's, and that, it seems to me, is what has happened here.

Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for _____ hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

Mr. Justice McKENNA concurs in this opinion.²¹

²¹ The dissenting opinion of Mr. Justice Brandeis is omitted.

CHAPTER V

INDUCING BREACH OF COMPETITOR'S CONTRACTS

BOSTON GLASS MANUFACTORY v. BINNEY.

(Supreme Judicial Court of Massachusetts, 1827. 4 Pick. 425.)

This was an action on the case, charging the defendants with enticing from the plaintiffs' employment certain workmen skilled in several departments of glass-making, and taking them into the service of the defendants, who were proprietors of a glass manufactory at Lechmere's Point in Cambridge.

The plaintiffs proved that some of the workmen were in their employment until the day when they were engaged in the employment of the defendants, and that it was mutually understood that neither party should withdraw from the engagement without giving a fortnight's notice.

The plaintiffs also offered in evidence certain articles of agreement, made between some of the officers of the plaintiff corporation, some of the defendants, and other persons, all being concerned in the manufacture of glass, by which each party stipulated, that he would not employ any workman who might be in the service of either of the others, unless such workman first produced a written discharge, and would not encourage any such workman to seek a discharge; that each party should keep the others advised of the names of the workmen in his employment; and that the agreement should continue in force five years. The defendants objected that this agreement, if it proved anything, was a contract, and not evidence in this action. It was rejected by the Chief Justice; but lists of the names of workmen, which had been furnished by the plaintiffs, were admitted in evidence.

One of the men supposed to have been enticed, having been called as a witness by the defendants, testified that Parmenter, one of the defendants, agreed with him, the day after he had given notice to the plaintiffs that he should leave their service in a fortnight, to receive him into the defendants' works; and it appeared that this man, and another who was called by the defendants, received pay from the defendants for the last fortnight while they were under pay from the plaintiffs; but it did not appear that any offer was made before notice had been given, and the men remained with the plaintiffs until the fortnight after notice had expired.

The defendants contended that they had a right to make a bargain with the men during the continuance of their service with the plaintiffs, to take effect only after the expiration of that service according to notice. But the Chief Justice instructed the jury, that while the

actual employment continued, though after the notice to quit, it was not lawful for the defendants to make any bargain or any offer of employment to take effect at a future time, and that if the jury believed the witness, they must return a verdict against Parmenter, and such others of the defendants as they should be satisfied participated in the transaction.

A verdict was found for the defendants. If the evidence offered by the plaintiffs and rejected at the trial ought to have been admitted, a new trial was to be granted. If the foregoing instruction to the jury was correct, the Court were to judge whether a new trial should be granted on account of the verdict's being against the evidence on that point.

WILDE, J., delivered the opinion of the Court. The counsel for the plaintiffs move for a new trial on two grounds: First, because certain contracts offered by them in evidence were not admitted; secondly, because the verdict, according to the law as laid down at the trial by the Chief Justice, is against the evidence.

As to the first point, we think it very clear that the contracts offered in evidence were not admissible, not having any tendency to establish any fact material to the issue. The contracts with the laborers who are said to have been enticed from the plaintiffs' employment, had expired long before the acts complained of; they could not therefore by any possibility be material; and as to the contract or agreement between some of the plaintiffs and some of the defendants, it is a sufficient objection, that the defendants are not sued upon that agreement; nor could they be, for it is between different parties.

As to the second point, we are of opinion that the verdict is right. The evidence is clearly insufficient to support the action, as we understand the law. The defendants had a legal right to make a contract with the plaintiffs' laborers to take effect after the expiration of their term of service with the plaintiffs. The law is laid down correctly by Lord Kenyon, in the case of *Nichol et al. v. Martyn*, 2 Esp. R. 732, that "to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention at the time, of quitting his master's service, was not subject of an action." It is *damnum absque injuria*. The cases cited by the plaintiffs' counsel do not countenance a different doctrine. If the law were otherwise, it would lead to the most mischievous consequences, and would operate injuriously both to laborers and their employers.

Judgment according to the verdict.

SALTER v. HOWARD.

(Supreme Court of Georgia, 1871. 43 Ga. 601.)

Howard averred that certain eighteen negroes were employed by him as his servants for carrying on his farming operations, yet Salter, knowing this fact, and with a view to injure him, on the 29th of January, 1866, wrongfully enticed them away into *his* service, whereby Howard lost the profits of their labor.

Howard testified about the 24th of December, 1865, he hired said negroes to work on his plantation for 1866. They were to furnish themselves and get one-third of the crop. These terms were reduced to writing, he took a copy and gave them one, but neither he nor they signed the contract, because it was desirable to fill up the number of hands wanted before going to sign before the Freedmen's Bureau agent. These negroes were on his place till about the 22d of January, 1866, when they left, saying they were going to defendant. About that time Salter's wagon came for them, but Howard sent it back, with a note that he had employed them for 1866, and he supposed he, Salter, would not employ them. Salter's agent sent back an insolent reply. Subsequently the negroes left. He found them on Salter's place and demanded them from him. Salter replied that he would not drive the negroes off, but Howard could send the sheriff after them. Howard said he would send the sheriff after them and him too. Salter said he had made no contract with the negroes as the papers were not signed. Howard considered the signing not necessary to constitute the contract, but whether the negroes did he did not know.

He said he was damaged \$3,000. Because these negroes had provisions, while those whom he afterwards employed had none, he had to furnish them, and failing to make a crop he lost the price of these provisions. Thus he lost \$2,500. The interruption in the preparation of his crop, extra expense and loss of time were worth \$500. Here the plaintiff rested his cause. Defendant's counsel moved for a nonsuit, upon the ground that the alleged contract of Howard was incomplete. The motion was overruled. The defendant offered no testimony. The jury found for plaintiff for \$1,200. Defendant's counsel moved for a new trial upon the grounds that the verdict was contrary to the principles of equity, decidedly against the weight of evidence, and contrary to law, and because the Court erred in overruling the motion for nonsuit. The new trial was refused, and that is assigned as error.

LOCHRANE, Chief Justice. This was an action brought by Howard against Salter, to recover damages for enticing servants out of his employ. The case came for trial at August adjourned term of Houston Superior Court, and the jury found for the plaintiff the sum of \$1,200.

A motion for a new trial was made by the defendant upon the following grounds, to wit: (1) That the Court erred in refusing a nonsuit. (2) That the verdict was contrary to evidence and law, etc. The Court

overruled the motion for a new trial, and this constitutes the ground of error assigned.

1. The motion for nonsuit was upon the ground that the plaintiff had proven no contract, consummated and complete, for the hiring of the negroes charged to be enticed by the defendant from the service of the plaintiff. The evidence in the case substantially showed that the servants were upon Howard's place, and at work at the time they left, and that he had made a contract with them which was to be approved by the Freedman's Bureau, but which had not been done. From an examination of the evidence we are of opinion that the written contract was incomplete, and we do not place our judgment in this case upon the validity of that contract. But the fact that these servants were under employment by Howard, and, in performance of such agreement, were upon his place at work, constituted, as to third parties, such a relationship of master and servant as protected them from being interfered with or enticed to leave his plantation. We do not hold that it is necessary to sustain this action that there must be a written contract, or that any third party can take advantage of formal defects in one if written. If under employment the servants are at work, any person intruding upon the rights of the master by enticing them away, is liable in an action of damages, and we therefore concur with the Court in refusing the new trial sought upon this ground.

As to the other grounds of error alleged, we are satisfied from the evidence that there was sufficient proof to sustain the verdict of the jury, so far as relates to the enticing of these servants. The defendant's wagon went to plaintiff's place after them, and plaintiff sent it back, with a note stating the negroes were in his employment, and subsequently the negroes left and were found on defendant's plantation.

2. But we hold that the Court erred in admitting the evidence of damage upon the part of plaintiff in relation to the fact that these servants had provisions to furnish themselves with, and those he employed in their place had none, and he had to furnish them, that he made a poor crop, and never got pay for these provisions, losing thereby \$2,500. The damage the law gives in cases of this character are limited to actual damages incurred at the time and by reason of the loss of the servants, and not the speculative damages arising out of poor crops, or such remote causes of damage. The loss arising from the interruption in the preparation or planting of his crop, loss of time and expenses in replacing them with other hands; or if at a season of the year when the crop may be lost by such interruption, or actual damage incurred by such loss of labor to his crop at the time, is the measure of damages which should be allowed by the jury. And, inasmuch as the Court erred in the admission of this evidence, we reverse the judgment of the Court below upon this ground.

Judgment reversed.

LUMLEY v. GYE.

(Court of Queen's Bench, 1853. 2 El. & Bl. 216, 118 Eng. Reprint, 749.)

The first count of the declaration stated that plaintiff was lessee and manager of the Queen's Theatre, for performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing; yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform during the term.

Count 2, for enticing and procuring Johanna Wagner to continue to refuse to perform during the term, after the order of Vice Chancellor Parker, affirmed by Lord St. Leonards (see *Lumley v. Wagner*, 1 De G., McN. & G. 604), restraining her from performing at a theatre of defendants.

Count 3. That Johanna Wagner had been and was hired by plaintiff to sing and perform at his theatre for a certain time, as the dramatic artiste of plaintiff, for reward to her, and had become and was such dramatic artiste of plaintiff at his theatre; yet defendant, well knowing, &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged.

Demurrer. Joinder.

The demurrer was argued in the sittings after Hilary term last, February 4 and 5, 1853, before COLERIDGE, WIGHTMAN, ERLE, and CROMPTON, JJ.

ERLE, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures

or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.

Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to shew that the principle has been recognized. In *Winsmore v. Greenbank*, Willes, 577, it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*, 2 C., M. & R. 707, it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Shepherd v. Wakeman*, 1 Sid. 79, to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison*, 1 Peake's N. P. C. 194, 1 Esp. N. P. C. 48, and in *Taylor v. Neri*, 1 Esp. N. P. C. 386, it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shewn to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs.

To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird v. Randall*, 3 Burr. 1345, is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right

ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of nonpayment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the nondelivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for nondelivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

COLERIDGE, J. * * * In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner. After much consideration and enquiry I am of opinion that neither of these propositions is true; and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these; that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 Edw. III, and both on principle and according to authority is limited by it. If I am right

in these positions, the conclusion will be for the defendant; because enough appears on this record to shew, as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First, then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from the injury. The injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavour, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence. However complete the injuria, and whether with malice or without, if the act be after all sine damno, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained.

If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C. urgently and bona fide advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted; the malice has been ineffectual. In the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and let C. have persuaded, not bona fide, but mala fide and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is malitia sine damno, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion; there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the

consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously.

This was the principle on which Lord Kenyon proceeded in *Ashley v. Harrison*, 1 Peake's N. P. C. 194, 1 Esp. N. P. C. 48. There the defendant libelled Madame Mara: the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord Kenyon nonsuited the plaintiff; he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a procuring. In *Winsmore v. Greenbank*, Willes, 577, the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect," and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable—as in trespass—even where it is used towards a free agent; the maxims, "*qui facit per alium facit per se*," and "*respondeat superior*," are unquestionable; but where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed.

But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shews that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of *Winsmore v. Greenbank*, Willes, 577, seems to me to have little or no bearing on the present. A wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintain-

able by him against her. In the case of criminal conversation, *très-pass* lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank*, Willes, 577.

A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited, Mich. 11 H. IV, fol. 23 A, pl. 46, post, p. 255, Judge Hankford (William Hankford, Justice of the Common Pleas in 1398, afterwards in 1414 [1 H. V], Chief Justice of England) gives the answer: 'The reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument *primæ impressionis* is sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried.

Now we find a plentiful supply both of text and decision in the case of seduction of servants: and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this, too, be considered: That, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of *Adams v. Bafeald*, 1 Leon. 240, and *Blake v. Lanyon*, 6 T. R. 221, are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest

request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay; and this reason is given: "the very act of giving him employment is affording him the means of keeping out of his former service."

Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Labourers, to which no reference was made. But I mention this case now as shewing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less it is for the jurymen. Again, why draw the line between bad and good faith? If advice given *mala fide*, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them? According to all legal analogies, the *bona fides* of him who, by a conscious willful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss.

Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to [be] recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover, too, may be removed several steps backward from the party actually induced to break the contract; why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my Brother Alderson in the case of *Winterbottom v. Wright*, 10 M. & W. 109; if we go the first step, we can shew no good reason for not going fifty. And again I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence; they are not of slight importance, and could hardly have been decided without reference to the Courts in *Banc*. Not one was cited in the argument bearing closely enough

upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.¹ * * *

Judgment for plaintiff.

SWAIN v. JOHNSON.

(Supreme Court of North Carolina, 1909. 151 N. C. 93, 65 S. E. 619, 28 L. R. A. [N. S.] 615.)

Action by L. F. Swain against C. R. Johnson and others. From a judgment of nonsuit, plaintiff appeals.

BROWN, J. We deem it unnecessary to discuss the 70 exceptions set out in the record, as in our opinion the whole case may be reviewed in passing upon the correctness of his honor's ruling in granting the motion to nonsuit. The plaintiff contends that he contracted with the defendant Noble to purchase all the pine and juniper timber on certain lands belonging to the Cox heirs, said Noble being their attorney in fact, with power to sell the land; that the defendants West and Johnson conspired together, and induced Noble to violate his contract with plaintiff, by purchasing the lands from Noble for a corporation, the West Lumber Company, in which West and Johnson are interested, wherefore, for such alleged tort, the plaintiff claims substantial damage. The principle of law upon which plaintiff founds his right of action is thus stated in Comyn's Digest, Action on Case, A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."

This principle has been applied in some jurisdictions to the violation of contracts for personal service, and was so applied in this state in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, although by a divided court. It has been applied to the malicious enticing away of workmen; to the loss of a contract of marriage by means of a false and malicious letter; to maliciously enticing and inducing a wife to remain away from her husband; and to maliciously inducing an opera singer to abandon her contract—but we find no case in any court where it has ever been applied to breaches of contracts to convey title to property. It is true that in *Jones v. Stanly*, 76 N. C. 356, it was applied where the president of a railroad company maliciously prevented his company from performing a contract of carriage of freight, and in that case Judge Rodman says: "The same reasons cover every case where one person maliciously persuades another to break any contract with a third person." This is but a dictum,

¹ Parts of the opinion of Coleridge, J., are omitted, as are the opinions of Justices Crompton and Wightman.

and in commenting on it the Supreme Court of Kentucky, in a well-considered opinion in *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 547, 34 Am. St. Rep. 165, says: "We have seen no other case where the doctrine is stated so broadly." This Kentucky authority, with the voluminous notes of the annotator and the numerous cases cited, support fully the text of Judge Cooley that "an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff; the consequences, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley on Torts, 497.

To this rule there are but two generally recognized exceptions; one where servants and apprentices are induced from malicious motives to leave their master before the term of service expires, and the other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button*, 2 Crompt. M. & R. 707; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559. This is based upon the idea that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference in his private affairs. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, it is *damnum absque injuria*. *Walker v. Cronin*, 107 Mass. 564. It is only where the contract would have been fulfilled but for the false and fraudulent representations of a third person that an action will lie against such third person. *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 621, citing *Pasley v. Freeman*, 3 T. R. 51.

The case of *Ashley v. Dixon*, supra, is in every respect similar to the one under consideration. In that case the New York court holds: "If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead; and, if not guilty of fraud or misrepresentation, he does not incur liability, and this is so although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former." This doctrine is supported by abundant authority. Cooley on Torts, supra; *Otis v. Raymond*, 3 Conn. 413; *Young v. Covell*, 8 Johns. (N. Y.) 25, 5 Am. Dec. 316; *Johnson v. Hitchcock*, 15 Johns. (N. Y.) 185; *Gallager v. Brunel*, 6 Cow. (N. Y.) 347; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104.

Tested by these generally accepted principles the plaintiff has entirely failed, for he does not allege, and there is not a shred of evidence to prove, that Noble was ready and willing to perform his alleged contract with plaintiff, but that he was prevented against his will from so doing by the false and fraudulent representations of West and Johnson, or either of them. In fact it is hard to discover in the record any evidence that, at the time West is alleged to have

purchased the timber, the plaintiff had any subsisting contract with Noble. The latter had given plaintiff an option, but it had expired. Then Noble placed the deed with his attorney, Wooten, to be delivered in case plaintiff paid the purchase money in three days as agreed, which the plaintiff failed to do.

Tested by the dictum of Judge Rodman in *Jones v. Stanly*, supra, the plaintiff also fails, for under that authority, if followed, plaintiff must both allege and prove malice upon the part of West and Johnson, and he fails as to both. The evidence does not disclose any illegal act committed by either West or Johnson, much less an evil one. The latter agreed to buy the timber from plaintiff, who then held an option on it, provided his attorney, Judge Shepherd, pronounced the title good. He examined it and pronounced it bad, and Johnson declined to purchase. After plaintiff had failed to take up the deed from Wooten and pay the price agreed upon between him and Noble, West purchased the timber from Noble, and deposited the money to await the perfecting of the title. It is very hard to discover in the evidence any moral, much less legal, wrong done the plaintiff by these defendants, or either of them. He lost the purchase of the timber, not by any fraudulent practices of West or Johnson, wheréby Noble was prevented from selling to the plaintiff, but because he failed to pay Wooten the money for Noble and take the deed at the time agreed upon.

The judgment is affirmed.

BEEKMAN v. MARSTERS.

(Supreme Judicial Court of Massachusetts, 1907. 195 Mass. 205, 80 N. E. 817, 11 L. R. A. [N. S.] 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332.)

Bill by Gabriel E. Beekman against George E. Marsters for an injunction. Reserved by single justice for the determination of the Supreme Judicial Court.

LORING, J. This suit came before the single justice on the report of a master to which no exceptions had been taken by either party, and was reserved by him for our consideration and determination without any ruling or decision having been made.

The master found that on November 21, 1906, a contract was made between the plaintiff and the Jamestown Hotel Corporation. The Jamestown Hotel Corporation is a corporation which is erecting or has erected a hotel within the grounds of the Jamestown Exposition to be held between April 26th and November 30th of this year. This hotel is known as the "Inside Inn," and is to be the only hotel within the exposition grounds. The plaintiff is the proprietor of a tourist agency, having an office at 293 Washington street, Boston. By the contract between the plaintiff and the hotel corporation the plaintiff agreed to represent the hotel corporation throughout the New England states, to establish subagencies in that territory, and to use every possible endeavor personally and through his agents to book persons for the Inside Inn; and the defendant agreed "that you [the plaintiff] shall be our exclusive agent in said territory," to pay him [the plaintiff] 25 cents a day for each person sent by him to the hotel, and to furnish the plaintiff with all necessary "literature."

Immediately upon being thus appointed the exclusive agent of the hotel corporation the plaintiff prepared and issued a fall edition of his "Tickets and Tours," in which inter alia a description is given of the Jamestown Exposition and of the Inside Inn. Following this is the statement that the plaintiff has been appointed New England agent for the exposition "and exclusive representative of the Inside Inn."

The defendant is found by the master to be a ticket and tourist agent, with an office at 298 Washington street, Boston. On January 11, 1907, he went to Norfolk, Va., and called upon the officers of the hotel corporation there. At this time he "had seen the contract between the complainant and the hotel corporation, but had not read it, and knew that the company had practically consummated a contract making Beekman its sole representative in New England." The defendant at this interview told these officers "that it was a mistake for the corporation to give an exclusive agency in New England to any one man, and that more business would be brought to the company if all agents were given equal terms," and to enforce his arguments stated that the business done by the plaintiff was insignificant

and that the statement was false which was made in the summer edition of his "Tickets and Tours" that certain persons therein named had his tickets and tours for sale. It appeared that the summer edition of this catalogue had been shown to the hotel corporation by the plaintiff when he made his contract with it.

The master found that "as a result of the solicitations or representations made by the respondent, the Jamestown Hotel Corporation on or about January 11, 1907, entered into an oral contract with him, whereby it was agreed that the respondent should have the same rights that had been given to the complainant, and that he should be paid by the corporation 25 cents per capita per day for each guest whom he should secure for the Inside Inn."²

Lastly, he found: "The damage which he will sustain if the respondent or other persons are allowed to act as agents or to book guests or issue coupons in this manner is incapable of accurate ascertainment. The loss to the complainant will not be merely the loss of the commission of 25 cents per capita per day, which would otherwise be received from the hotel, but it will be the loss of profits on tours which he might otherwise be able to arrange."

The result of the findings of the master must be taken to be that the defendant induced the hotel corporation to break its contract with the plaintiff, but that it did not do this to spite the plaintiff or for the purpose of injuring him, but for the purpose of getting for himself (the defendant) business which the plaintiff alone was entitled to under the contract with the hotel corporation, that is to say, to get business which the defendant could not get if the hotel corporation kept its agreement with the plaintiff.

Three defenses have been set up by the defendant, namely: First, that he had a right to do what he did; second, that the plaintiff does not come into court with clean hands; and, third, that the plaintiff has an adequate remedy at law by bringing an action for damages.

1. So far as the first defense is concerned, it is in effect that where A. is under a contract to serve the plaintiff for a specified time, the defendant, knowing that contract to be in existence, is justified in hiring A. away from the plaintiff before the expiration of that time, by giving him (A.) higher wages if he (the defendant) thinks that to be for his (the defendant's) pecuniary benefit. The ground on which the defendant bases this contention is that he has a right to compete with the plaintiff and that the right of competition is a justification for thus hiring away the plaintiff's servant.

We say that this is in effect the defense set up here because it has been settled in Massachusetts that there is no distinction between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract be-

² Parts of the master's findings are omitted.

tween him and the plaintiff. That was decided by this court in *Walker v. Cronin*, 107 Mass. 555. See page 567. See, also, *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289. In other words, this court there adopted the conclusion reached by the majority of the judges of the Queen's Bench in *Lumley v. Gye*, 2 El. & Bl. 216. This is also the settled law of the Supreme Court of the United States. *Angle v. Chicago, St. Paul, etc., Ry.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. And it has been affirmed in England. *Bowen v. Hall*, 6 Q. B. D. 333; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88; *Glamorgan Coal Co., Limited, v. South Wales Miners' Federation*, [1903] 2 K. B. 545; s. c. on appeal, sub nomine *South Wales Miners' Federation v. Glamorgan Coal Co., Limited*, [1905] A. C. 239.

No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights. Not only has no case been cited in which that has been held, but no case has been cited in which that contention has been put forward.

It happens, however, that Judge Wells in defining the rights of competition has denied the existence of such a justification. In discussing the first count in *Walker v. Cronin*, 107 Mass. 555, 564, he said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with." And it also happens that in *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88, *Darling, J.*, in discussing the rights of a labor union to induce the plaintiff's employers to break their contract of apprenticeship with him, denied it. He there said: "To resume, I think the plaintiff has a cause of action against the defendants, unless the court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference—to use Lord Macnaghten's words. This sufficient justification they may have had, and they may prove it; but the facts found by the county court judge and relied on by him as enough do not amount to one; for it is not a justification that 'they acted bona fide in the best interests of the society of masons,' i. e., in their own interests. Nor is it enough that 'they were not actuated by improper motives.' I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights,

or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

It is hard to see how this court could have decided *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, as it did were it the law that self-interest is a justification for intentionally interfering with a plaintiff's contractual rights. The same is true of *Bowen v. Hall*, 6 Q. B. D. 333, if not of *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88.

The argument here urged by the defendant comes from not distinguishing between two cases which not only are not the same but are altogether different so far as the question now under consideration is concerned.

If a defendant by an offer of higher wages induces a laborer who is not under contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights. But it is a quite different thing if the laborer was under a contract with the plaintiff for a period which had not expired, and the defendant, knowing that, intentionally induced the laborer to leave the plaintiff's employ by an offer of higher wages, to get his (the laborer's) services for his (the defendant's) benefit.

A plaintiff's right to carry on business, that is, to make contracts without interference, is an altogether different right from that of being protected from interference with his rights under a contract already made. The existence of both rights and the difference between the two is recognized by *Wells, J.*, in *Walker v. Cronin*, 107 Mass. 555; the first count in that case went on the first right, and the second and third counts on the second right. Again, the existence of the two is recognized and stated by *Holmes, J.*, in *May v. Wood*, 172 Mass. 11, 14, 15, 51 N. E. 191.

Where the plaintiff comes into court to get protection from interference with his right of possible contracts, that is, of his right to pursue his business, acts of interference are justified when done by a defendant for the purpose of furthering his (the defendant's) interests as a competitor. It was this right that the plaintiff came into court to assert in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555 (so far as the first count was concerned); *G. Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Wood*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, and *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (so far as the third prayer for relief was concerned).

The cases of *Walker v. Cronin*, 107 Mass. 555 (so far as the second and third counts were concerned), *May v. Wood*, 172 Mass. 11, 51 N.

E. 191, *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, and *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (so far as the second prayer for relief was concerned), are cases of the second class.

There are statements in opinions in Massachusetts and in England that a defendant is not liable for interference with a plaintiff's rights in both of these two classes of cases unless he acts maliciously. Within the meaning of malice as used in these opinions in the case at bar there was no necessity of proving spite or ill will toward the plaintiff. This is not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant with knowledge of the contract between the plaintiff and the hotel corporation intentionally and without justification induced the hotel corporation to break it. That is proof of malice within the meaning of that word as used in these opinions. *South Wales Miners' Federation v. Glamorgan Coal Co., Limited*, [1905] A. C. 239.

We do not rest our decision in this case (as we have been urged to do by the plaintiff) on cases like *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, *Lumley v. Wagner*, 1 DeG. M. & G. 604, *Stiff v. Cassell*, 2 Jur. (N. S.) 348, *Donnell v. Bennett*, 22 Ch. D. 835, *Manchester Canal Co. v. Manchester Race Course*, [1901] 2 Ch. 37, *Manhattan Manuf. Co. v. New York Stock Yard Co.*, 23 N. J. Eq. 161, *Western Union Telegraph Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13, and *Baker v. Pottmeyer*, 75 Ind. 451. Those are cases where the plaintiff, having a contract which a court of equity would specifically enforce in whole or in part, brings a bill for specific performance against the other party to the contract, and as ancillary to a decree for specific performance against the other party to the contract asks that the third person who is about to contract or has contracted with him be also enjoined. The plaintiff made out his right to maintain this suit against the defendant alone by proving that he in fact induced the hotel corporation to break its contract with the plaintiff. In case of ordinary contracts (that is to say, contracts which will not be specifically enforced in equity), a plaintiff does not go far enough to render a defendant liable for unlawful interference with his contractual rights, when he proves that the defendant, in using the ordinary methods of promoting and increasing his own business, obtained business from the other party to the plaintiff's contract which that other party could not have given him without breaking his contract with the plaintiff, and that this was known to the defendant. To charge the defendant in such a case the plaintiff must prove that it was the act of the defendant which brought about the breach of the contract with the plaintiff.

Whether contracts which equity will specifically enforce stand on a different footing need not be considered.

2. The next defense is that the plaintiff does not come into court

with clean hands.³ * * * The ordinary rule is that it is only with regard to the plaintiff's rights against the defendant that the plaintiff must come into court with clean hands. *American Association, Limited, v. Innis*, 109 Ky. 595, 60 S. W. 388; *Deering v. Winchelsea*, 1 Cox, 318; *Kinner v. Lake Shore & Michigan Southern Ry.*, 69 Ohio St. 339, 69 N. E. 614; *Meyer v. Yesser*, 32 Ind. 294; *Lewis & Nelson's Appeal*, 67 Pa. 153, 166. * * *

Taken as a whole, the legal significance of all the matters relied on by the defendant in this connection is that the plaintiff's contract with the hotel corporation was procured by fraud and that all the defendant has done is to tell that corporation the truth. The answer to this is, first, that the master has not found fraud; second, that the hotel corporation has not elected to rescind its contract with the plaintiff for fraud or for any other reason; and, lastly, that the defendant did not confine himself to telling the defendant the truth about false representations of the plaintiff by which he procured the making of the contract, but went further and urged as an argument for inducing the corporation to break its contract with the plaintiff that it was a mistake to appoint an exclusive agent at all, that they could make more money if their agency was not exclusive, no matter who the agent was.

3. The finding of the master as to the damages which the plaintiff is likely to suffer shows that an action at law would not give him an adequate remedy. Where the plaintiff proves that the defendant unlawfully interferes or threatens to interfere with his business or his rights under a contract, and further makes out in proof that damages will not afford an adequate remedy, equity will issue an injunction. The issuing of injunctions in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, and similar cases the last of which is *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, are decisions directly in point.

The terms of the injunction should be in substance that the defendant be restrained from directly or indirectly acting as agent of the hotel corporation within the New England states, and from preventing or seeking to prevent, directly or indirectly, the plaintiff from acting as exclusive agent of the hotel corporation for that territory.

So ordered.

³ A part of the discussion of this defense is omitted.

RICE v. MANLEY.

(Commission of Appeals of New York, 1876. 66 N. Y. 82, 23 Am. Rep. 30.)

Appeal from order of the General Term of the Supreme Court in the Fourth Judicial Department reversing a judgment in favor of plaintiffs, entered upon the report of a referee.

Reported below, 2 Hun, 492.

This was an action for fraud. The facts sufficiently appear in the opinion.

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus county. There had been no compliance with the statute of frauds so as to make the agreement binding upon either party, but both parties would have performed it but for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could sell the cheese and plaintiffs did not care for it. He took the dispatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of this fraud; but the General Term reversed the judgment, holding, upon the authority of the case of *Dung v. Parker*, 52 N. Y. 494, that the plaintiffs could recover no damage, because the agreement for the sale of the cheese to the plaintiffs, by Stebbins, was void by statute of frauds.

It was said by Coke, J., in 3 Bulst. 95, that "fraud without damage or damage without fraud, gives no cause of action; but when these two concur an action lies." This language has been frequently quoted with approval by judge and text writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts. Fraud and falsehood are mala in se, and wrongful in the eye of the law, so that if damage results therefrom there is the damage and wrong necessary to create a cause of action. Ad. on Law of Torts, 25. In 2 Hilliard on Torts, 75, the learned author lays down the rule as follows: "In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself." And it must also be added that plaintiff was deceived and damaged.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would

have performed the agreement and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage, so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A. a legacy, and was prevented from doing it solely by the fraud of B.; in such case, while A. has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B., depending upon the facts of the case. *Kerr on Frauds*, 274, and cases cited; *Bacon, Abr. Fraud, B.* Suppose A. made a parol contract with B. for the purchase of land, and B. is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C. as to A., by which B. is deceived and induced to convey to C.; in such case, although A. could not have compelled B. to give him the conveyance, it would be a reproach to the law to hold that C. would not be liable to A. for the damage caused by the fraud. [The court here reviews *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Snow v. Judson*, 38 Barb. 210, and *Pasley v. Freeman*, 3 Term R. 51, *Green v. Button*, 2 C., M. & R. 707, and distinguishes *Dung v. Parker*, 52 N. Y. 494.

This cheese was contracted for by plaintiffs for the New York market, and it was proved that the New York market for cheese controls the price of cheese in Cattaraugus county. The only market for cheese in that county was for transportation to, and sale in, New York; hence it was competent to prove the value of this cheese in New York, and the cost of transportation there, with the view of placing before the referee facts which would enable him to estimate plaintiffs' damage. *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Harris v. Panama Railroad Co.*, 58 N. Y. 660; *Griffin v. Clover*, 16 N. Y. 489, 69 Am. Dec. 718; *Heineman v. Heard*, 50 N. Y. 27.

The order of the General Term must be reversed, and judgment upon report of referee affirmed, with costs.

CHAPTER VI

BOYCOTTING

GREAT ATLANTIC & PACIFIC TEA CO. v. CREAM OF WHEAT CO.

(Circuit Court of Appeals of the United States, 1915. 227 Fed. 46, 141 C. C. A. 594.)

This cause comes here upon appeal from an order refusing to grant an injunction restraining defendant from refusing to sell its goods to complainant. The facts are quite fully set forth in the opinion of Judge Hough, which is reported in 224 Fed. 566.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Briefly summarized the facts are these: In the production of wheat flour from wheat, there is a sort of by-product, known as "purified middlings." It is produced by every flouring mill in the United States engaged in the manufacture of wheat flour; it is a staple commodity regularly quoted and dealt in in all grain markets. Defendant buys "purified middlings," selecting such as it thinks grade high in quality. Without submitting them to any process or treatment, without adding anything to them, it puts up the middlings which it selects in packages and offers its selection to the trade under the name "Cream of Wheat." That name identifies packages containing middlings of defendant's selection, and it has protected its trade-name for such selection by a copyright covering the carton in which the cereal is packed. Either because it has used good judgment in its selection, or because it has well advertised its trademark, it finds a ready market for its packages. Its particular selection, however, amounts to less than 1 per cent. of the total purified middlings bought and sold in this country.

With an exception which will be referred to later, defendant makes no sales to consumers or to retailers, but confines its sales exclusively to wholesalers, to whom it charges two prices, \$3.95 per case in car load lots and \$4.10 per case in less than car load lots. To each purchaser from it, it sends a circular requesting such purchaser to sell to the retail trade only at a price of \$4.50 per case, adding to this request the statement that it does not intend to waive the right to refuse at any time to supply any dealer who shall fail to comply with any request made by it, the infringement of which defendant may deem prejudicial to the interests of the consumer, to defendant's own business, or to the trade at large. Complainant contends that defendant's course of conduct is a violation of the Sherman Anti-Trust Act and that under the recent Clayton Act this suit may be instituted and maintained by complainant.

That branch of the case has been most elaborately argued; it was discussed by the District Judge. We do not find it necessary to go into it, as we are satisfied that complainant is not entitled to the relief now asked for.

As was stated before, defendant has elected not to sell to consumers or retailers, but to confine its sales exclusively to wholesalers. There is nothing unusual about such a course of business, and certainly it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities. A "wholesaler" is one who buys in comparatively large quantities and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a "jobber" (a sort of middleman) or to a "retailer"; the latter being the one who sells to the consumer. The "large" quantities bought by the wholesaler may vary greatly—from a fraction of a car load to many car loads; the character, not of his buying, but of his selling, marks him as a wholesaler. If occasionally, in some particular business, this term loses somewhat of its original significance, such manifestly, as the record shows, is not the fact with the business now under consideration.

Upon the proof and the admissions in the record, this complainant is not a wholesaler, but a retailer; it does not confine its sales to retailers, but sells to countless consumers—a package at a time for 12 cents.

Defendant, as we have seen, in the conduct of its business, decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. It named the prices at which it would sell to wholesalers, so much in car load lots, so much in less than car load lots. That certainly it had a right to do; the Clayton Act itself expressly recognizes the existence of this right. Under the rule which defendant had legitimately established for the conduct of its own business, complainant could not buy from it, because complainant was a retailer. Nevertheless, for a time, defendant made an exception to its rule, and sold to complainant, under some arrangement, which, as defendant thought, would not make the wholesalers with whom it dealt critical of the exception. On a certain day defendant decided that it would no longer sell to this retailer at all, and since then it has not sold to complainant. There was no contract between the two which bound defendant to sell to complainant for any specified period of time. This suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers who trade with it.

Much has been said about the reason why defendant ceased to treat complainant as an exception to its rule; failure of the latter to live up to some arrangement, etc. All that seems to be wholly immaterial. The business of defendant is not a monopoly, or even a quasi monop-

oly. Really it is selling purified wheat middlings, and its whole business covers only about 1 per cent. of that product. It makes its own selection of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones, and Robinson to make their selections out of the other 99 per cent. of purified middlings and put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may persuade the public that they are. It is difficult to see how into such a business as that any novel and exceptional rule of law is to be imported. We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley on Torts, p. 278. See, also, our own opinion in *Greater New York Film Co. v. Biograph Co.*, 203 Fed. 39, 121 C. C. A. 375.

Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government.

The order is affirmed.

MOGUL STEAMSHIP CO., Limited, v. MCGREGOR, GOW & CO.

(Court of Appeal, Queen's Bench Division, 1889. L. R., 23 Q. B. Div. 598.)

BOWEN, L. J. We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control

of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of 5 per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports.

The acts of which the plaintiffs particularly complained were as follows: First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight. Thirdly, the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field. Fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which they were done, and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves.

We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like man-

ner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicini nocendi*, may enter into or affect the conception of a personal wrong; see *Chasemore v. Richards*, 7 H. L. C. 349, at page 388. All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Council in *Rogers v. Rajendro Dutt*, 13 Moore, P. C. 209, "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary.

Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (see *Bromage v. Prosser*, 4 B. & C. 247; *Capital and Counties Bank v. Henty*, per Lord Blackburn, 7 App. Cas. 741, at page 772. The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a

right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence, *Tarleton v. M'Gawley*, Peak, N. P. C. 270; the obstruction of actors on the stage by preconcerted hissing, *Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205; the disturbance of wild fowl in decoys by the firing of guns, *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, note; the impeding or threatening servants or workmen, *Garret v. Taylor*, Cro. Jac. 567; the inducing persons under personal contract to break their contracts, *Bowen v. Hall*, 6 Q. B. D. 333; *Lumley v. Gye*, 2 E. & B. 216—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade.

To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea, freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.

But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' coun-

sel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight"? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner.

But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. "*Sic utere tuo ut alienum non lædas.*" If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable. See *Chasemore v. Richards*, 7 H. L. C. 349. If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy. See

Skinner v. Gunton, 1 Wms. Saund. 229; *Hutchins v. Hutchins*, 7 Hill's New York Cases, 104; *Bigelow's Leading Cases on Torts*, 207.

But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means. *O'Connell v. The Queen*, 11 Cl. & F. 155; *Reg. v. Parnell*, 14 Cox, Criminal Cases, 508. And the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to shew that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only.

The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former.

There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes

of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible; would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity (see *Rex v. Waddington*, 1 East, 143); to combine to purchase all the shares of a company against a coming settling day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match vendors combine to sell matches below their value in order by competition to drive a third match vendor from the street?

In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse"? If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist none the less because what was done might seem to others to be selfish or unreasonable. See the summing up of Erle, J., and the judgment of the Queen's Bench in *Reg. v. Rowlands*, 17 Q. B. 671. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse.

One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg. v. Rowlands*, 17 Q. B. 671, at page 687, note, of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not

enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognise their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton v. Eckersley*, 6 E. & B. 47, is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in *Cousins v. Smith*, 13 Ves. 542, is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his *Lives of the Chancellors*. If, indeed, it could be plainly proved that the mere formation of "conferentes," "trusts," or "associations" such as these were always necessarily injurious to the public—a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron régime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common-law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my view is this: That competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

In my opinion, accordingly, this appeal ought to be dismissed with costs.¹

¹ The statement of facts, the concurring opinion of Fry, L. J., and the dissenting opinion of Lord Esher, M. R., are omitted. The decision was affirmed in the House of Lords. [1892] App. Cas. 25.

LOUGH v. OUTERBRIDGE.

(Court of Appeals of New York, 1894. 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.)

O'BRIEN, J.² * * * * The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant the Quebec Steamship Company is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly 20 years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received.

The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer *El Callao*, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passenger and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course.

The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would

²A part of the statement of facts is omitted.

agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the El Callao, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained; but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. * * *

Except during the week when the El Callao was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. * * *

The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive.⁸

But it is urged that the plaintiffs were in fact the only shippers of goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to

⁸ It is then held that there had been no violation of the common carrier's duty not to discriminate.

such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasonable, is seldom, if ever, material. *Phelps v. Nowlen*, 72 N. Y. 39; *Kiff v. Youmans*, 86 N. Y. 324.

The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the *El Callao* proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines.

On this branch of the argument the remarks of Lord Coleridge in the case of *Steamship Co. v. McGregor*, *supra* [2 Q. B. Div. 544], are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful

means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders."

The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

FINCH, GRAY, and BARTLETT, JJ., concur.

PECKHAM, J., dissents.

ANDREWS, C. J., not sitting.

Judgment affirmed.

MACAULEY v. TIERNEY.

(Supreme Court of Rhode Island, 1895. 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770.)

MATTESON, C. J. The complainants are master plumbers, engaged in the business of plumbing. In the transaction of their business, they purchase materials from wholesale dealers in Rhode Island and other parts of the United States, and, among others, from L. H. Tillinghast & Co., of Providence, who, with the New England Supply Company, are the only wholesale dealers in plumbing materials in this state. The respondents are also master plumbers, and officers and members of the Providence Master Plumbers' Association, a voluntary association, affiliated with the National Association of Master Plumbers of the United States. The latter association, on June 26, 1894, adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material selling to others than master plumbers; that the masters should demand of manufacturers and wholesale dealers in plumbing material to sell goods to none but mas-

ter plumbers; that the association should keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers; that a committee be appointed by the association in every state and county for the purpose of reporting to the proper officers, any violations of these resolutions; that the convention urge upon the association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction. Subsequently, a resolution of amendment was adopted, that the interpretation of the resolutions be left in the hands of the executive committee with power. Still later, a resolution was adopted, "that it is the sense of this convention that in the future the interpretation of the term of 'master plumber,' as set forth in the above resolutions, be construed to mean master plumbers that have qualified under state or local enactments where such exist."

It is alleged by the complainants that the interpretation put by the executive committee of the National Association on these resolutions is that those only are to be regarded as master plumbers who are members of the National Association, or members of the several local associations affiliated with the National Association; that the complainants have been informed by various wholesale dealers outside of this state that they will not sell them supplies unless they shall join the Providence Master Plumbers' Association, and that these dealers are forced to refuse to sell them supplies because of the resolutions referred to and because of the action of the Providence Master Plumbers' Association in causing such dealers to be notified not to sell to the complainants. That the Providence Master Plumbers' Association, acting through the respondents, has issued notice to L. H. Tillinghast & Co. and the New England Supply Company to sell supplies to none but members of the association; and that, in consequence of these notices, these wholesale dealers have notified the complainants and other master plumbers that they will not sell plumbing materials to plumbers not members of the Master Plumbers' Associations in the places in which they do a plumbing business, or members of the National Association; and that, since the date limited in the notices, these dealers have refused to sell to the complainants; and that they have been unable to purchase supplies from them and from other wholesale dealers in the United States. The bill prays that the respondents may be directed to rescind the notices given, and that the respondents may be enjoined from all further interference with the complainants by notifying such dealers not to sell to them, or by further requests to said National Association to prevent them from buying supplies anywhere in the United States. Testimony has been submitted by the complainants tending to prove the allegations of the bill.⁴

Assuming that the allegations are fully sustained by the proof, have the complainants made a case entitling them to relief? We think not.

⁴The statement of facts is abridged somewhat.

The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended to injuriously affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business.

The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances.

A leading and well-considered case on this subject was *Steamship Co. v. McGregor*, 23 Q. B. Div. 598 [1892] App. Cas. 25. * * * The case at bar contains no element of the character of those enumerated by the Lord Justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others, as in the cases cited by the Lord

Justice. Closely analogous to the case at bar was the recent case of *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119.⁵

See, also, *Payne v. Railroad Co.*, 81 Tenn. 507, 514-519; *Cote v. Murphy*, 159 Pa. St. 420, 421, 28 Atl. 190; *Heywood v. Tillson*, 75 Me. 225, 233.

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid, as though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence it follows that, as the object of the combination between the members of the associations was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 129; *Bowen v. Matheson*, 14 Allen, 499; *Wellington v. Small*, 3 Cush. 145, 150; *Carew v. Rutherford*, 106 Mass. 1, 14; *Payne v. Railroad Co.*, 81 Tenn. 507, 521; *Hunt v. Simonds*, 19 Mo. 583, 588; *Robertson v. Parks*, 76 Md. 118, 134, 135, 24 Atl. 411; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25; *Manufacturing Co. v. Hollis*, 54 Minn. 223, 234, 55 N. W. 1119; *Delz v. Winfree*, 80 Tex. 400, 404, 16 S. W. 111.

We are of the opinion that the bill should be dismissed.

BAILEY v. MASTER PLUMBERS.

(Supreme Court of Tennessee, 1899. 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.)

[The facts and a part of the opinion in this case are printed post, p. —.]

CALDWELL, J. The association now before the court has other by-laws, which further illustrate and demonstrate its hurtful and unlawful tendency. Two of them are as follows:

⁵ Extended reviews of, and quotations from, the two cases last cited are omitted.

"Art. 9. No member of this association shall purchase any supplies from any supply house, manufacturer, or dealer in plumbing materials who does not comply with the rules and requirements of this association.

"Art. 10. No member shall buy material of any kind from a jobber who buys material from a manufacturer who sells plumbing or gasfitting material to any one in our city who is not a member of our association."

Manifestly these provisions were intended to restrain all members of the association in their purchases of "supplies" and "material," and all dealers who sell to them, in their sales; and at the same time to embarrass nonmembers, and "boycott" dealers who sell to them. The restraint is fourfold. It operates upon members and upon dealers who sell to them, upon nonmembers and upon dealers who sell to them; and in each of the four particulars it interrupts that freedom in trade to which all of them were otherwise entitled, and which the public is interested to have them enjoy. All members and all nonmembers were of right entitled to buy from any and all dealers, at their election, yet the members are restricted to dealers who sell to none but members, and nonmembers are restricted to dealers who sell to none but nonmembers, and, likewise, all dealers were of right entitled to sell to all persons who desired to purchase, yet those of them who sell to members are forbidden to sell to others, and those who sell to others are thereby deprived of sales to members. Thus and to this extent the public loses the benefit of fair and free competition, which it is always entitled to have.

These by-laws virtually divided the trade in plumbing materials and supplies for Memphis into two main parts, in the nature of combinations, one of them being represented by members of the association and dealers who sell to them alone, and the other being represented by nonmembers and dealers who sell to them alone; and thereby the two classes are intended to be arrayed against each other, not in fair and free competition, but with a view to the ultimate demolition of the latter class and the entire control of the trade by the former class. The underlying thought is the destruction of all competition with nonmembers, by driving them out of the business, and the acquisition of the whole trade for members, whose competition among themselves and whose prices to customers are subject to the illegal rule already considered. It is entirely true, as in effect observed in *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, and in *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, that, in the first instance, each member of the association had a perfect legal right to buy material and supplies, exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail.

But, in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference in legal contemplation between individual right and combined action in trade is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority "was palpably and unequivocally a combination in restraint of trade." *Association v. Kock*, 14 La. Ann. 168. Any one of several companies had the right to sell the whole or only a part of its output to only such persons, in only such territory, and at only such prices as it pleased, yet it was inimicable to the interests of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose. *Arnot v. Coal Co.*, 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173. The same was held to be true, as to the individual company and the combined companies, respectively, in the *Sugar-Trust Case* (previously cited) 3 N. Y. Supp. 401, and 7 N. Y. Supp. 406.⁶

The fact that every plumber in the city of Memphis had the legal right originally to purchase supplies and materials from any dealer or dealers he might choose did not justify the association in the passage of by-laws requiring its members to buy from that class of dealers it saw fit to name. The two things are not the same, but antagonistic. The former is freedom; the latter, restraint. Only members of the association are technical parties to these by-laws, and as such subject to the punishment of expulsion for their violation. Nevertheless all persons engaged in plumbing work in the city of Memphis, and all dealers in plumbing material and supplies, wherever located, who sell to them, are necessarily affected by their natural operation, to the extent and in the manner already indicated; and all of those dealers who agree to sell to members of the association only, by that agreement and its observance become parties to the scheme, and assume the same attitude before the law as if they had been technical parties to the by-laws, and agreed to observe them, in the first instance. The proof in the record discloses the fact that several dealers out of the state ratified the by-laws, as far as relating to themselves, and repeatedly refused

⁶ A further citation of cases is omitted.

to sell material and supplies to nonmembers, for no other reason than that doing so would be a violation of the by-laws, and subject them, as dealers, to a "boycott" by the association.

This action of important dealers was the consummation of a vital part of the complex scheme; and the arrangement so accomplished, as the natural and intended result of these by-laws, is an illegal restraint on trade, a combination and trust, in limited form, tending to stifle competition and to create a monopoly in a particular line and community. By-laws with such capabilities, import, and design are clearly obnoxious to the common law, as well as violative of our statutes (Shannon's Code, §§ 3185, 6622), which forbid and declare unlawful, null, and void "all trusts, pools, contracts, arrangements, or combinations," or corners, or other devices that are intended to destroy or prevent, or that have a tendency to destroy or prevent, "full and free competition in the production, manufacture or sale of any article of legitimate traffic," or that "are designed or tend to fix, regulate, limit," reduce, or increase the price of such article, or to create a monopoly or a corner therein, or that may in any manner "injuriously affect the legitimate trade and commerce of the country." Whether these by-laws be regarded as a contract, an arrangement, a combination, or a trust, one or all,—and we think they partake of the nature of all of them,—there can be no reasonable doubt that they were intended and are well calculated to prevent full and free competition in the purchase and sale of articles of legitimate traffic, to influence the prices thereof, and thereby to injuriously affect trade and commerce within the territory contemplated.⁷

Reversed and dismissed.

STATE ex rel. DURNER v. HUEGIN.

(Supreme Court of Wisconsin, 1901. 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.)

Applications of Albert Huegin, Andrew J. Aikens, and Melvin A. Hoyt for release on habeas corpus. From orders discharging them on habeas corpus the State, on the relation of George Durner, Sheriff, brings error. Reversed.⁸

MARSHALL, J. According to the complaint it was in substance agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the

⁷ It is then held that the by-laws are void because not authorized by the charter.

⁸ The further statement of the facts is omitted, as are large parts of the opinion, dealing in the main with other questions. The statute referred to in the opinion is St. Wis. 1898, § 4166a.

Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates 25 per cent. above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate.

Now, it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such purpose means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement, by reasonable inference, the independent purpose to harm the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors.

If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any benefit that could be suggested would be so remote and trifling as

not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper was so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional. * * *

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person, acting by himself, or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune, in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations,—with such success, in fact, that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds.⁹

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we

⁹ A further discussion of this point is omitted.

have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect, where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens v. Reilly* (decided Jan. 8, 1901) 109 Wis. 464, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases, as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be rewritten. The following are the cases referred to: *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598, decided in House of Lords and reported in [1892] App. Cas. 25; and *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181.¹⁰

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley v. Simmons*, has, to some extent, influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. * * *

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade, and render combinations successful by the malicious destruction of the business of competitors, is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. * * *

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation

¹⁰ An extended review of these cases and the citation of numerous other cases are omitted.

of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense.

The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "*De minimis non curat lex*" applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of their being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, supra [(C. C.) 60 Fed. 803], the union of individual forces by agreement, to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle.

Our conclusion is this: The term "malicious injury," as used in the statute, is synonymous with that term at the common law; it

refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not, in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Brammel in *Reg. v. Druitt*, 10 Cox, Cr. Cas. 593, that it has often been quoted by courts and text-writers and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

The orders of the circuit court discharging the defendants in error are severally reversed and the cause is remanded with directions to remand them to the sheriff of Milwaukee county.

DODGE, J., took no part.

THOMSEN v. CAYSER.

(Supreme Court of the United States, 1917. 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322.)

Action, brought in the Circuit Court of the United States for the Southern District of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.¹¹

The defendants, it is charged, * * * united under the name of "The South African Steam Lines" and distributed a circular * * * promising to pay shippers by their lines 10 per cent. upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the 31st of January and the 31st of July in each year, and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who

¹¹ The statement of facts is abridged.

directly or indirectly imports goods by vessels other than those despatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye, & Company, as its agent, offered to transport merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of avoiding the competition of those carriers, accepted them into the scheme and combination, and there was agreement between them to continue the monopoly, and another circular was issued like the first, including only the additional announcement that the Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as Exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal, the rebates would be paid to the shippers, while if the consignee alone were loyal, the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not despatched steamers to African ports at stated and regular dates, but have placed steamers on berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112. 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line and the Houston Line, have since the spring of 1902, offered to carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment, and imposed the following further condition: (1) Precedent to the payment of

such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade, and in fact have prevented shippers who had already shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid, "who would not continue to remain loyal under the additional conditions superimposed as aforesaid." * * *

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all, and to lose a great deal of their trade, or to ship on defendants' steamers a small portion of merchandise at the lower rates, and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer. * * *

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiffs certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid, and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading, and

in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that, so far as any of the payments were made pursuant or with reference to the printed circulars, plaintiffs co-operated knowingly in such transactions, and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. 933.

The judgment was reversed by the Circuit Court of Appeals (October, 1908). 92 C. C. A. 315, 166 Fed. 251.

Upon the return of the case to the circuit court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Cayser, Irvine, & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court. * * *

The judgment was reversed by the Circuit Court of Appeals, one member dissenting (July, 1911). 111 C. C. A. 368, 190 Fed. 536. * * *

Mr. Justice MCKENNA, after stating the case as above, delivered the opinion of the court.¹²

The case in the courts below had a various fate, victory alternating between the parties, but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the Circuit Court of Appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the Circuit Court of Appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of trade, and that such character was necessary to make it illegal under the federal Anti-Trust Act. As to the fact of combination and restraint and the means employed both trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade to South African ports with-

¹² The discussion of some of the contentions of defendants is omitted.

out competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below and we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling; that is, that it was constrained to do so by *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734, and *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade. *Nash v. United States*, 229 U. S. 373, 376, 57 L. Ed. 1232, 1235, 33 Sup. Ct. 780; *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U. S. 600, 609, 58 L. Ed. 1490, 1498, L. R. A. 1915A, 788, 34 Sup. Ct. 951.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them,¹³ or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." And we have since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49, 57 L. Ed. 107, 117, 33 Sup. Ct. 9; *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, 34 Sup. Ct. 859.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their

¹³ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25.

duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a primage charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies, and who had not, directly or indirectly, made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference,"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently excused, but loyalty upon the part of shippers was continued to be exacted, and its reward was the refunding of the primage charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the court of appeals considering that while it was in restraint of trade, the restraint was reasonable and therefore not obnoxious to the law.

The Court of Appeals has not given us its reason for its conclusion. Counsel for defendants say that the Standard Oil and Tobacco Cases furnished the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition, or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial, and not a detrimental, agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law nor any other necessity fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates;" and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade, others might have

done so and been willing to serve shippers without construing them—been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors, or that under competing lines, service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so.

That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital, and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law. * * *

The next contention is that the fact of combination should have been submitted to the jury, and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect. * * *

Judgment of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

RAYMOND BROS.-CLARK CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1922. 280 Fed. 529.)

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge, delivered the opinion of the court.

This is an original proceeding by petitioner to obtain a review of an order of the Commission whereby petitioner, its officers and agents, were ordered to forever cease and desist from directly or indirectly,

"(1) Hindering or preventing any person, firm, or corporation in or from the purchase of groceries, provisions, or the like commodities direct from the manufacturers or producers thereof, in interstate commerce, or attempting so to do.

"(2) Hindering or preventing any manufacturer, producer, or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.

"(3) Influencing or attempting to influence any manufacturer, producer, or dealer in groceries, provisions, and the like commodities, not to accept as a customer any firm or corporation with the manufacturer, producer, or dealer in the exercise of a free judgment, has or may desire to have such relationship."

This order was made in a proceeding commenced by the Commission against petitioner for the alleged violation of the provisions of section 5 of an Act to create a Federal Trade Commission, approved September 26, 1914 (38 Stat. 717 [Comp. St. § 8836e]), in using an unfair method of competition against the Basket Stores Company, a corporation organized under the laws of Nebraska. Although the charge made against petitioner was with reference to said Basket Stores Company, the order above set forth is as broad as the business world, and in any event would have to be modified if it were to be sustained in any particular. The order, however, was made pursuant to findings of fact made by the Commission, which are as follows:

"(1) Respondent is a corporation organized under and existing by virtue of the laws of the state of Nebraska. Its principal place of business is at Lincoln, Nebraska. Respondent's business is that of a wholesale grocer, buying groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the state of Nebraska to the warehouse of the respondent at Lincoln, Nebraska, and are resold and transported to customers in and beyond the state of Nebraska. The business operations of the respondent include sales and deliveries in Nebraska, Colorado, Kansas, Wyoming, South Dakota, and Montana, and its annual volume of business is approximately \$2,500,000. In the conduct of its business the respondent is in competition, among others, with the Basket Stores Company.

"(2) The Basket Stores Company is a corporation organized under and existing by virtue of the laws of the state of Nebraska. Its principal place of business is at Omaha, Nebraska. The Basket Stores Company conducts two lines of business—one, that of a wholesale grocer, and that of retail selling through a chain or organization of retail stores. As a wholesale grocer, the Basket Stores Company maintains a warehouse at Omaha and a branch warehouse at Lincoln, Nebraska. It buys groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the state of Nebraska to the warehouses of the Basket Stores Company at Omaha and Lincoln, Nebraska, and are resold in part and transported to customers within and outside the state of Nebraska. This part of the Basket Stores Company's business is about ten per cent. of the total. The Bas-

ket Stores Company was licensed as a wholesale grocery house by the United States Food Administration, which fact was known to the respondent. The Basket Stores Company also operates a series or chain of retail stores, seventy-two in number, four of which are in Iowa, the remainder being located in Nebraska. There are, at this time, eighteen stores operated by the Basket Stores Company in Lincoln. The groceries, provisions, and like commodities distributed through these stores were supplied from the Basket Stores Company's warehouses. About 90 per cent. of the company's business was done through these retail stores. The total annual volume of the Basket Stores Company's business is approximately \$2,500,000.

"(3) In the month of September, 1918, a representative of F. A. Snider Preserve Company solicited from the Basket Stores Company's officials at its head office at Omaha and obtained an order for commodities produced by the Snider Company, to be shipped to the warehouse of the Basket Stores Company at Lincoln.¹⁴

"(6) On October 8, 1918, * * * the respondent in writing protested to the Snider Company against the sale direct to the Basket Stores Company and asked for the allowance of the regular jobbers' profit on the sale as though made through respondent.

In response to a request from the Snider Company for payment respondent wrote on November 16 declining to make payment to the Snider Company for goods purchased from it by the respondent * * * until allowance was made respondent for the jobbers' commission on the sale to the Basket Stores Company. The Snider Company suggested that respondent remit, taking credit for amounts claimed and explaining fully the reasons therefor. The respondent complied, deducting, among other amounts, the sum of \$100 as commission on the sale to the Basket Stores Company. This deduction, among others, the Snider Company refused to allow and returned the remittance. Whereupon on December 16 respondent wrote the Snider Company, insisting upon the allowance of this commission, protesting against the action of the Snider Company in selling direct to the Basket Stores Company and threatening the Snider Company with the cessation of respondent's business and return of all the goods produced by the Snider Company then in respondent's stock if this commission were not allowed and the Snider Company continued direct sales to the Basket Stores Company.

"(7) Early in January following, the Snider Company sent a representative to Lincoln, who interviewed the president of the respondent in an attempt to obtain a settlement of the controversy, which was not successful. The respondent, in accordance with the statements in its letter of December 16, ceased to purchase from the Snider Company."

¹⁴ A part of the recital of the facts is omitted.

The Commission concluded from the above findings of fact that the conduct of petitioner unduly hindered competition between the Basket Stores Company and others similarly engaged in business, and that the intent and purpose of the petitioner was to press the F. A. Snider Company to a selection of customers in restraint of its trade and to restrict the Basket Stores Company in the purchase of commodities in competition with other buyers. We are of the opinion that the findings of the Commission do not show petitioner to have been guilty of an unfair method of competition so far as the Basket Stores Company is concerned, or others similarly engaged in business. There is no finding that petitioner combined with any other person or corporation for the purpose of affecting the trade of the Basket Stores Company or others similarly engaged in business. So far as petitioner itself is concerned it had the positive and lawful right to select any particular merchandise which it wished to purchase and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer or in this particular instance with the F. A. Snider Preserve Company for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right cannot be charged against petitioner as an unfair method of competition. *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443; *Victor Talking Machine Co. v. Kemeny* (C. C. A.) 271 Fed. 810; *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993; *Jergens v. Woodbury* (D. C.) 271 Fed. 43, 44; *Cudahy Co. v. Frey & Sons*, 261 Fed. 65, 67, 171 C. C. A. 661; *Union Pacific Coal Co. v. U. S.*, 173 Fed. 737, 97 C. C. A. 578; *Dueber Watch-Case Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 644, 645, 14 C. C. A. 14; *Western Sugar Refinery Co. et al. v. Federal Trade Commission* (Ninth Circuit, Oct. 10, 1921) 275 Fed. 725; *Kinney-Rome Co. v. Federal Trade Commission* (Seventh Cir. Sept. 8, 1921) 275 Fed. 665; *Standard Oil Co. v. Federal Trade Commission* (C. C. A.) 273 Fed. 478, 17 A. L. R. 389; *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, 1 A. L. R. 1915A, 788; *U. S. v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 48, 141 C. C. A. 594.

Being of the opinion that the facts found by the Commission do not show an unfair method of competition by petitioner, its petition to revise is granted and the order of the Commission is vacated and set aside.

ANDREW JERGENS CO. v. WOODBURY, Inc.

(District Court of the United States, 1920. 271 Fed. 43.)

In Equity. Suit by the Andrew Jergens Company against Woodbury, Incorporated, and others. On motion for leave to file amended answer.

MORRIS, District Judge. The Andrew Jergens Company filed its bill of complaint, setting up exclusive right in it to use the name "Woodbury" or "Woodbury's" and the trade-mark (now registered), consisting of a reproduction of a neckless head, upon dermatological preparations and toilet articles, charges the defendant Wm. A. Woodbury Distributors, Inc., and others, with infringement of those rights, and prays for the usual relief.

The defendant Wm. A. Woodbury Distributors, Inc., now moves for permission to substitute by way of amendment a new answer for the answer heretofore filed. The plaintiff opposes the motion. The proposed new answer differs from the answer heretofore filed in two substantial particulars only: Both are by way of addition. The first is an affirmative averment, accompanied by allegations of the facts upon which this averment is based, that the plaintiff does not come into court with clean hands. The second point of difference is that the answer now offered for filing sets up a counterclaim against the plaintiff. The grounds of plaintiff's opposition to the proposed amendment are: First, that the want of clean hands is not in reality a defense, and may be taken advantage of although not pleaded; and, second, that the counterclaim as set up is not valid in law.

The first ground of opposition seems well taken. It is supported by *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 155 Fed. 964, 974, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921, and *Bell & Howell Co. v. Bliss* (C. C. A.) 262 Fed. 131, 135. No case taking the contrary view has been cited. It follows that an amendment to the answer is not needed to enable the court to invoke the maxim in question should the facts so warrant.

As a counterclaim the defendant states certain facts to show that it is entitled to use the word "Woodbury" or "Woodbury's," together with the "neckless head," on certain toilet articles and preparations, and charges: "That plaintiff * * * has threatened to and did refuse to deal with, or to sell its products, the products of plaintiff, to dealers, * * * and the like, who dealt with defendant, and did otherwise intimidate dealers, * * * and the like, into declining to deal with defendant. * * *"

The defendant relies on *Schonwald v. Ragains*, 32 Okl. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854, and *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331, in support of its contention that the acts of the plaintiff so charged entitle the defendant to relief. But, as I understand those cases, the decision in the for-

mer is based upon the malicious interference by the defendant with the contracts of the plaintiff, and the latter case rests upon a threat to ruin a customer of another should the customer continue his dealings with that other. The wrongs for which relief was there given are not the wrongs forming the basis of defendants' counterclaim. The charge made in the proposed answer, as I view it, falls within the principle laid down in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993, and *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, to the effect that a trader or manufacturer may, in the absence of an intent to create or maintain a monopoly, freely exercise his own discretion as to parties with whom he will deal, and that he may announce in advance the circumstances under which he will refuse to sell. I think these cases, rather than *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, also cited by the defendant, furnish the rule by which the sufficiency of the counterclaim must be measured.

The defendant likewise charges: "That plaintiff * * * has threatened to and did refuse to deal with * * * trade journal publishers, * * * who dealt with defendant, and did otherwise intimidate * * * trade journal publishers * * * into declining to deal with defendant. * * *"

This charge is too vague, indefinite, and uncertain to show a cause of action in the defendant against the plaintiff. It may mean no more than that the plaintiff declined to advertise in trade journals carrying the advertisements of the defendant. If so, in the absence of further facts, I fail to see, under the reasoning of *Federal Trade Commission v. Gratz* and *United States v. Colgate & Co.*, how the defendant may justly complain.

In view of the foregoing conclusions, I am of the opinion that leave to file the proposed amended answer would not be in furtherance of justice and should be denied.

An order in conformity herewith may be submitted.

KEMP v. DIVISION NO. 241, AMALGAMATED ASS'N OF STREET AND ELECTRIC RY. EMPLOYÉS OF AMERICA.

(Supreme Court of Illinois, 1912. 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347.)

COOKE, J. The circuit court of Cook county sustained a demurrer interposed by appellants to a bill for injunction filed by appellees, and entered a decree dismissing the bill for want of equity. Appellees prosecuted an appeal to the Appellate Court for the First District, and the cause was assigned to the branch of that court. For the pur-

pose of having a final judgment in the Appellate Court, appellants, by stipulation, elected to stand by their demurrer, and the court reversed the decree and remanded the cause to the circuit court, with directions to overrule the demurrer and enter a decree in accordance with the prayer of the bill. The Appellate Court granted a certificate of importance, and appellants have prosecuted an appeal to this court.¹⁵ * * *

The question presented for our determination therefore is whether a court of equity is authorized, upon application by the nonunion employes, to restrain the union and its officers from calling a strike of the union employes in accordance with the vote previously taken by the union employes as members of the union, where the purpose of the proposed strike is to compel the employer to discharge the non-union employes who are engaged in the same class of work. In order to decide this question in the affirmative, it would be necessary to hold that, had the threatened act been completed, appellees would have been entitled to maintain an action for damages against the union and its officers for accomplishing their discharge from the service of the Railways Company, and that such action at law would not afford an adequate remedy because of the financial inability of appellants to respond in adequate damages for the injuries which appellees would suffer by reason of their discharge. The inadequacy of the remedy at law sufficiently appears from the bill, and it will only be necessary to determine whether the appellees would have been entitled to maintain the action for damages had their discharge been accomplished by appellants.

That appellees would sustain damages if discharged by the Railways Company, and that such discharge and consequent damages would be occasioned by the acts of the appellants, acting for and on behalf of the union employes, clearly appears from the bill. The mere fact that one person sustains damage by reason of some act of another is not, however, sufficient to render the latter liable to an action by the former for such damage, but it must further appear that the act which occasioned the damage was a wrongful act and not one performed in the exercise of a legal right, otherwise it is *damnum absque injuria*. * * *

Every employé has a right to protection in his employment from the wrongful and malicious interference of another resulting in damage to the employé; but, if such interference is but the consequence of the exercise of some legal right by another, it is not wrongful, and cannot, therefore, be made the basis for an action to recover the consequent damages. It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the

¹⁵ The opinion has been shortened by extended omissions from the recital of the facts and the discussion of the question involved.

service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the Legislature, nor is it subject to any control by the courts; it being guaranteed to every person under the jurisdiction of our government by the thirteenth amendment to the federal Constitution, which declares that involuntary servitude, except as a punishment for crime, shall not exist within the United States or any place subject to their jurisdiction. Incident to this constitutional right is the right of every workman to refuse to work with any coemployé who is for any reason objectionable to him, provided his refusal does not violate his contract with his employer; and there is no more foundation for the contention that the employé commits an actionable wrong by informing the employer, before he leaves the service, that he will not work with the objectionable coemployé, and thereby occasioning his discharge, than there would be for the contention that the employé would commit an actionable wrong by quitting the service and afterward stating to the employer his reason therefor, if as a result thereof the employer should choose to discharge the objectionable coemployé. In either case the employé is exercising a legal right, and although it results in damage to the objectionable coemployé the latter has no cause of action against the former for causing his discharge.

In the case at bar, had the union employés, as individuals and without any prearranged concert of action, each informed the Railways Company that they would no longer work with appellees because appellees were not members of the union, and had appellees, in consequence thereof, been discharged because the Railways Company chose to retain the services of the union employés, appellees would have had no cause of action against the union employés for thus causing their discharge. Does the fact that the union, its officers and committees, acted as an intermediary between the union employés and the Railways Company, and under the circumstances and for the purposes disclosed by the bill, render unlawful the action by it or them which would have been lawful if performed by the union employés individually?

Labor unions have long since been recognized by the courts of this country as a legitimate part of the industrial system of this nation. The ultimate purpose of such organizations is, through combination, to advance the interests of the members by obtaining for them adequate compensation for their labor, and it has been frequently decided by the American courts that the fact that this purpose is sought to be obtained through combination or concerted action of employés does not render the means unlawful. * * *

The purpose of organizing labor unions is to enable those employés who become members to negotiate matters arising between them and their employers through the intermediation of officers and committees of the union and to accomplish their ends through concerted action. If duly authorized by the employés to adjust any controversy

arising between them and their employer, the union, its officers, and committees are merely acting as agents of the employes in the matter. If the union employes had the legal right to inform their employer of their refusal to work with appellees, they had the legal right to convey that information to the employer through an agent or agents, and the agent or agents would not commit an actionable wrong thereby nor by reporting back to the union employes the result of the conference with the employer. The demand that appellees be discharged, and the threat that unless the Railways Company complied with the demand the members of the union would call a strike of the employes of the Railways Company, in effect meant no more than the mere statement that the union employes of the Railways Company would no longer work with the nonunion employes, and, if the Railways Company chose to retain in its employ the nonunion men, the union employes would quit the service of the Railways Company. * * *

No contract rights being involved, the union employes had a right to quit the service of the Railways Company, either singly or in a body, for any reason they chose or for no reason at all. If the only purpose of the union employes was to quit the service and permanently sever their connections with their employer, appellees would in no wise be damaged, and could have no grounds for injunctive relief. The bill discloses, however, that this was not the only purpose of the members of the union. They did not propose absolutely to sever their connection with their employer, but by means of a strike to withdraw temporarily their services, and then, by such means as might be proper and permissible, seek to induce their employer to accede to their demands and reinstate them in the service under the conditions they sought to impose. By thus combining it becomes necessary to inquire whether the purpose of the combination was a lawful one. * * *

While it cannot be successfully contended that every strike is lawful, it is generally conceded by our courts that workmen may quit in a body, or strike, in order to maintain wages, secure advancement in wages, procure shorter hours of employment, or attain any other legitimate object. An agreement by a combination of individuals to strike or quit work for the purpose of advancing their own interests or the interests of the union of which they are members, and not having for its primary object the purpose of injuring others in their business or employment, is lawful. As to whether the object which this bill discloses was sought to be attained by the members of the union was a lawful one or a valid justification of the threat to strike, the authorities in this country are clearly in conflict. * * *

That some of the cases cited by appellees support their contention cannot be denied. A contrary result has been reached, however, by the courts of some of the other states. This precise question has never been passed upon in this state, and, were the position of appellees to be sustained, it would be a long step in advance of any decision of this court. In the unsettled condition of the law on this question we are

not disposed to follow the cases cited by appellees. We are of the opinion that the cases holding the contrary view are supported by the better reasoning. * * *

No threats are made, and no violence is threatened. The members of the union have simply said to their employer that they will not longer work with men who are not members of their organization, and that they will withdraw from their employment and use such proper means as they may to secure employment under the desired conditions. While this is not a combination on the part of the union employes to maintain their present scale of wages to secure an advance in the rate of wages or to procure shorter hours of employment, all of which have been universally held to be proper and lawful objects of a strike, it cannot be said that this is not a demand for better conditions and a legitimate object for them to seek to attain by means of a strike.

It is insisted that a strike is lawful only in a case of direct competition, and, as it cannot be said that the union employes are in any sense competing with appellees, their acts cannot be justified. It is true, as has been stated, that the proposed strike was not to be called for the direct purpose of securing better wages or shorter hours or to prevent a reduction of wages, any one of which would have been a proper object. The motive was more remote than that, but it was kindred to it. The purpose was to strengthen and preserve the organization itself. Without organization, the workmen would be utterly unable to make a successful effort to maintain or increase their wages or to enforce such demands as have been held to be proper. The following view expressed by Mr. Chief Justice Holmes in his dissenting opinion in *Plant v. Woods*, supra [176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330], in discussing facts similar to those here involved, is in our opinion a correct statement of the law and is applicable here: "That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my Brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."

If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the

successful prosecution of the object of the combination injury may result incidentally to nonunion men through the loss of their positions, that object does not become unlawful. It is apparent that in this case the sole purpose was to insure employment by the Railways Company of union men only. The appellees had the right to retain their membership in the union or not, as they saw fit. On the other hand, if the members of the union honestly believed that it was to their best interests to be engaged in the same employment with union men only, and that it was a detriment and a menace to their organization to associate in the same employment with nonmembers, it was their right to inform the common employer that they would withdraw from its service and strike unless members of the union only were employed, even though an acquiescence in their demands would incidentally result in the loss of employment on the part of the nonunion men. It was only incumbent upon them to act in a peaceful and lawful manner in carrying out their plans. * * *

The cases of *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, and *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 Ann. Cas. 82, also relied upon by appellees, and the case of *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322, were all boycott cases. The courts are practically unanimous in holding that the acts done and proposed to be done in each of those cases are unlawful, for the reason that they are done with a wrongful motive and for the immediate purpose of inflicting an injury upon another. What was said in those cases applies only to the existence of a boycott or of a threat to boycott. This case partakes of none of the elements of a boycott. The primary object of a boycott being to inflict injury upon another has universally been held to be illegal. Here the primary object of the combination is to further the interests of the organization and improve and better the condition of its members. Whatever injury may follow to others is merely incidental.

The judgment of the Appellate Court is reversed and the decree of the circuit court is affirmed.¹⁶

QUINN v. LEATHEM.

(House of Lords. [1901] App. Cas. 495.)

The respondent brought an action in Ireland against five defendants, Craig, Davey, Quinn (the appellant), Dornan and Shaw, alleging causes of action which are summarised in the judgment of Lord Brampton. At the trial before FitzGibbon, L. J., and a special jury at Belfast in July, 1896, evidence was given for the plaintiff to the following effect: Craig was president, Quinn treasurer, and Davey secretary of

¹⁶ The opinion of Carter, J., specially concurring, and the dissenting opinion of Cartwright, J., Dunn, C. J., and Hand, J., are omitted.

a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to non-society men.

The plaintiff, a flesher at Lisburn for more than twenty years, in July, 1895, was employing Dickie and other assistants who were not members of the union. At a meeting of the association at which Craig, Quinn, Dornan and Shaw were present, and which the plaintiff attended by Davey's invitation, the plaintiff offered to pay all fines, debts and demands against his men, and asked to have them admitted to the society. This was refused, and a resolution was passed that the plaintiff's assistants should be called out. Craig told the plaintiff that his meat would be stopped at Munce's if he did not comply with their wishes. Munce, a butcher, had been getting about £30. weekly of meat from the plaintiff for twenty years.

The plaintiff in his evidence said: "For the last four years Munce has had an agreement with me to take my fine meat at so much a pound. He expected me to send it to him every week, and there was no week he did not get it. I had no written agreement with him. Whenever I killed I sent it, but I was not bound—only by word of mouth. It was only that if I sent it he would take it." What this meant did not clearly appear, but Munce's clerk who was called said: "Munce had no contract with the plaintiff; if he wanted his meat he could take it or reject it if he chose; it came weekly and was never refused. Neither was bound either to take or supply it."

In September Davey wrote to the plaintiff that if he continued to employ nonunion labour the society would be obliged to adopt extreme measures. After some negotiations with Munce Davey wrote to him that having failed to make a satisfactory arrangement with the plaintiff, they had no other alternative but to instruct Munce's employees to cease work immediately the plaintiff's beef arrived. On September 20 Munce sent a telegram to the plaintiff, "Unless you arrange with society you need not send any beef this week as men are ordered to quit work," and Munce ceased to deal with the plaintiff. The plaintiff said that in consequence of this he was put to great loss, a quantity of fine meat having been killed for Munce.

Dickie, who had been ten years in the plaintiff's employ, was called and said that he was employed by the week, that he was called out by the society, that he gave the plaintiff no notice when he left, that he left in the middle of the week, and that the plaintiff did not pay him for the broken week. There was no evidence of damage to the plaintiff, pecuniary or otherwise, caused by Dickie's breach of contract.

Evidence was given that "black lists" were issued by the society, containing (inter alia) the names of tradesmen who had dealings with the plaintiff, and one of whom was induced not to deal with him, but there was no evidence connecting Quinn with these lists.

The learned judge's notes of evidence proceeded thus:

At the close of the plaintiff's case "O'Shaughnessy, Q. C., asked for a non-suit or direction for the defendants on the grounds: 1st. That to sustain the action "a contract made with Leatham must be proved to have been made and broken through the acts of the defendants, and that there was no evidence of such contract or breach. 2nd. That there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants. 3rd. That the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

"I declined to withdraw the case from the jury. O'Shaughnessy, Q. C., then stated that he called no evidence for the defendants. Chambers addressed the jury for the plaintiff. O'Shaughnessy, Q. C., replied for the defendants. I charged the jury, leaving them the following questions, to which I append their findings: (1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. (2) Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiffs or not to continue in his employment, and were such persons so induced not so to do?—Answer: Yes. (3) Did the defendants Davey, Dornan and Shaw, or any of them, publish the 'black list' with intent to injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

"The jury found for the plaintiff, with £250. damages, of which £50. was for damages on the cause of action relating to the 'black lists,' and £200. was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the 'black lists,' and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgment for the plaintiff upon the other causes of action against all the defendants, with £200. damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the 'black lists' for the further sum of £50. damages.

"At the conclusion of my charge, O'Shaughnessy, Q. C., for the defendants, made the following objections and requisitions:

"(1) That I had given the jury no definition of damage, and he asked me to define damage as 'actual loss.'

"I told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have

been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. I told them that if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account.

"(2) That I had told the jury that the liability of the defendants depended on a question of law, and that as the defendants could not give their testimony as to their own intentions, observations which I had made upon their non-production amounted to misdirection.

"I did not tell the jury that the liability of the defendants depended on any question of law. I told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. I did not tell the jury that the defendants could be directly asked what their own intention was, but I did tell them that their intention was to be inferred from their acts and conduct as proved, and that in acting upon the evidence given by the plaintiff they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify or contradict any of the evidence given for the plaintiff as to their overt acts.

"(3) That the cause of action relating to the 'black list' was separate and should be separately left to the jury.

"I acceded to this objection, and directed the jury that there was not sufficient evidence to connect the defendants Craig and Quinn with the publication of the 'black lists.' As against the other three defendants, I told the jury that their acts in relation to the 'black lists' might be considered upon the issues relating to their intent and conduct generally.

"(4) That there was no question to go to the jury because no actual injury had been proved, as there was no evidence that any binding contract with the plaintiff had been broken through the action of the defendants, and there was no evidence of any money loss.

"Having told the jury that the proof of actual pecuniary loss directly caused to the plaintiff by the wrongful acts of the defendants must be established by the plaintiff as the foundation of the action, I declined to withdraw the case from them, having regard especially on the question of breach of a binding contract to the withdrawal of Dickie from the plaintiff's employment, and generally to the evidence as to the pecuniary loss on the sale of meat prepared for Munce, to the loss of his custom, and to the threat to withdraw his men if the plaintiff's meat arrived and was received at his shop. I advised the jury not to find for the plaintiff unless satisfied that he had sustained actual money loss in his business to a substantial

amount. Upon the meaning of the words 'wrongfully and maliciously' in the questions, I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. As to the 'black lists,' I told the jury that their publication would be actionable if done, without justification, for the purpose and with the effect of injuring the plaintiff in his business, by holding him up to unpopularity or disfavour with or by intimidating those who would otherwise have dealt with him.

"Finally, I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. Whether the acts of the defendants were or were not in that sense actionable was the question which I told the jury they had to try upon the evidence. At the conclusion of my charge, at the request of O'Shaughnessy, Q. C., for the defendants, I divided this single question into the written questions which I submitted to the jury as above stated.

"I approved of the verdict. The amount of damages was larger than I might myself have given, if it were within my province to assess damages. But I cannot say that any excess which there may be in the mere amount of damages is either so great, or having regard to the circumstances of the defendants and of the case, so material as to justify me in expressing disapproval of the verdict upon that ground alone."

The learned judge gave judgment for the plaintiff for £200. on the first and second causes of action against all the defendants, and for the further sum of £50. damages on the third cause of action against the defendants Davey, Dornan, and Shaw only, with costs.

A motion was made "to set aside the verdict and judgment and

enter a verdict for the defendants, or, in the alternative, for a new trial on the ground of misdirection of the learned judge in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that on the evidence no actionable wrong was shewn; in that he refused to direct for the defendants in the absence of evidence of damage fit to be submitted to a jury; and on the further ground that the learned judge misdirected the jury in that he refused to tell the jury their findings of damages was confined to damages shewn in the evidence, and, in the alternative, for a new trial on the ground that the damages were excessive and out of all proportion to the amount suggested in evidence, and that the learned judge further allowed the jury to take into account on the question of liability and damages a certain paper in the case called the 'black list,' and upon other grounds." This motion was refused with costs by the Divisional Court (Andrews, J., O'Brien, J., and Sir P. O'Brien, C. J., Pales, C. B., dissenting).

In the Irish Court of Appeal (Lord Ashbourne, L. C., Porter, M. R., Walker and Holmes, L. JJ.) the decision below was affirmed with costs, the judgment for the plaintiff being amended by omitting the part as to recovery of £50. damages, *Leathem v. Craig*, [1899] 2 I. R. 667. Quinn alone brought the present appeal. * * *

LORD LINDLEY.' Read by Lord Davey in Lord Lindley's absence. My Lords, the case of *Allen v. Flood*, [1898] A. C. 1, has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case, It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs, [1895] 2 Q. B. 22, 23; [1898] A. C. 3. The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs, [1898] A. C. p. 19, Lord Watson; p. 115,

Lord Herchell; pp. 147-150, Lord Macnaghten; pp. 161, 165, Lord Shand; p. 175, Lord Davey; p. 178, Lord James. There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: One a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen v. Flood*, [1898] A. C. 1. It had been gaining ground for some time but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen v. Flood*, [1898] A. C. 1, criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful"; i. e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no court or jury is bound as a matter of law to draw from the facts before it inferences of fact

similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was; (3) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalises strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgment in the *Mogul Steamship Company's Case*, 23 Q. B. D. 613, 614, may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood*, [1898] A. C. 1, to be opposed to it.

If the above reasoning is correct, *Lumley v. Gye*, 2 E. & B. 216, was rightly decided, as I am of opinion it clearly was. Further the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell*, [1893] 1 Q. B. 715,

ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood*, [1898] A. C. 1, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood*, [1898] A. C. 1. But in *Temperton v. Russell*, [1893] 1 Q. B. 715, there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*, [1898] A. C. 1. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were

violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co. v. MacGregor*, [1892] A. C. 25, and *Allen v. Flood*, [1898] A. C. 1, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood*, [1898] A. C. 1, in favour of the appellant. His sheet-anchor is *Allen v. Flood*, [1898] A. C. 1, which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man, without others behind him who would obey his orders, could not have done what these defendants did. One man, exercising the same control over others as these defendants had, could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood*, [1898] A. C. 1, Lord Herschell ([1898] A. C. at pages 128, 138) expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike; or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood*, [1898] A. C. 1, there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trade union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one

thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.*, [1892] A. C. 25, 23 Q. B. D. 598, that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen v. Flood*, [1898] A. C. 1, emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society v. Glasgow Fleshers' Association*, 35 Sc. L. R. 645, which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs shewed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to shew.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To

hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney v. Iloyd*, 26 L. R. Ir. 268. This is fully shewn in the various judgments now under review.

In *Huttley v. Simmons*, [1898] 1 Q. B. 181, the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendant turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

My Lords, I will detain your Lordships no longer. *Allen v. Flood*, [1898] A. C. 1, is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen v. Flood*, [1898] A. C. 1, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by

trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.¹⁷

WARE & DE FREVILLE, Limited, v. MOTOR TRADE ASS'N.

(Court of King's Bench. [1921] 3 K. B. Div. 40.)

SCRUTTON, L. J., read the following judgment:

This appeal raises a number of questions of law, on which in view of the state of the authorities it is very desirable that the House of Lords should make clear the effect of its various decisions.

The Motor Trade Association is a trade union composed of manufacturers in the motor trade, who by the course of that trade sell their goods through agents, who are required to sell at a fixed or list price, getting their profits from the discounts allowed them by the manufacturers. Those engaged in the trade regard it as undesirable that their goods should be sold to the public at either more than the list price, which may prejudice the demand for them and lead to profiteering, or at less than the list price, which may lead to competition between their agents and dissatisfaction among those who adhere to the list price.

The associated traders propose to stop these departures from the fixed price of their goods by refusing to sell their goods to any person, whether he be a member of the association or not, who sells their goods above or below the list price. As the person who acts in this matter might get the goods, which members will not sell to him direct, indirectly through other people, the associated members propose also not to supply their goods to any person who shall supply list price articles to a person whom the members will not supply directly. They propose to inform their members of the persons with whom they must not deal, because they have sold list price goods above or below the fixed price, by putting the names on a "stop list." As notice to their members would not reach non-members, who may buy from members and then sell the goods to the person aimed at, they propose to publish the stop list. The above appears to summarize the system and object of the Motor Trade Association and the by-laws by which it is enforced.

¹⁷ Only the opinion of Lord Lindley is printed and so much of that as holds inapplicable the statute of 38 and 39 Vict. c. 86, is omitted.

According to the evidence, after the war, when there was a great demand for cars, private persons, many of them speculators, ordered a car from each of a number of manufacturers, hoping to use the first delivered, and sell the rest at a profit. This had the natural result that the order books of the manufacturers did not represent the real demand, but the speculative opinion of the market. As Rowlatt, J., said: "If the orders are given that are not orders for cars bona fide intended for the use of the orderer it tends to block up? A. (the plaintiff's witness). Certainly." The association proposed therefore to deal with motor dealers who took part in selling above list price cars which were new in the sense that they had never been used, or indeed delivered by the manufacturer, when they were sold, by putting those dealers on the stop list.

The plaintiffs are motor dealers, not members of the association, who in September, 1919, were asked by a Mr. Blunt to sell "a new Vauxhall car, delivery in a few weeks." The makers' list price was £1125, and Mr. Blunt contemplated getting £1425 for himself plus the agents' commission, and the plaintiffs asked £1625 for it. Mr. Blunt was acting as representative of Mr. Astrom, a Finnish merchant. There is no evidence as to whether Mr. Astrom was speculating in cars or not. This transaction came to the notice of the Vauxhall Company, who complained to the association, who called upon the plaintiffs to appear before the committee of the association. The committee, when the plaintiffs did not appear, recommended the council to put their name on the stop list. The plaintiffs had notice of the meeting of the council, and appeared by legal representatives before the council. They argued that they had really only sold a second-hand car, and said they were most anxious to observe the by-laws of the association. The council determined to put them on the stop list, unless they contributed £50. to the Motor Benevolent Fund and undertook to exercise greater supervision in future. This they declined to do, and issued a writ in the present action. The judge below took a strong view of the term about £50., which he called "demanding money with menaces." If the stop list was justified, this means of avoiding it was in the plaintiff's favour; if it is not justified, the alternative way of avoiding it does not seem to make it any worse. It is the commonest transaction to say in a libel action, "I will not issue a writ or ask for damages if you will apologise and pay my costs," but I never heard it called "demanding money with menaces" before. The plaintiffs were in fact put on the stop list, which ran as follows: "The Motor Trade Association. In pursuance of its policy of conserving the fixed resale prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list under power of its by-laws. Complete current stop list No. ——— (All previous lists cancelled.) Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Association."

One further matter demands attention. The association's by-laws require members to insert a clause in their contracts for the supply of protected articles, that if the name of the purchaser should appear in the stop list the contract should be at an end; but they contain a proviso that the stop list shall not apply to contracts existing when the member joined the association which he had no power to terminate. These provisions were obviously intended to avoid coming in conflict with the decisions about the illegality of inducements to break existing contracts. Mr. Ware stated that before the council he urged that the stop list would involve the breach of existing contracts, and the chairman said he understood that. The stop list by its terms would in fact only require members who had made, after joining the association, and in breach of the by-laws of the association, contracts without the cancelling clause, to break them; but it would require them to break such contracts, and also to break contracts existing when the member joined the association. In some of the subsequent legal proceedings, on November 24 and 25, 1919, the defendants offered to give an undertaking to discourage any person who had a contract with the plaintiffs from breaking it on knowing their names. The plaintiffs for trade reasons declined to give their names, but were ordered to on a summons for particulars. When they gave the names, the defendants at once wrote to the four names given, stating that the stop list did not involve their breaking any contracts with the plaintiffs. There was no evidence that any person having a contract had in fact broken it; there was evidence that persons did decline to enter into fresh contracts to supply protected goods to the plaintiffs.

Under these circumstances Rowlatt J. found in favour of the plaintiffs on the ground that this was an attempt to prevent a person making a lawful disposition of his own or his principal's property by threats addressed to him and those who might deal with him. Though he mentions a suggested justification by trade interest under the *Mogul Case*, [1892] A. C. 25, and apparently rejects it, he does not make any express finding as to whether the threatened action was taken in protection of trade interests. He makes no finding on, and does not rest his judgment on, any cause of action for libel. The threats appear to be threats to do acts which the association has a legal right to do—namely, to refuse to supply goods to the plaintiffs or to persons dealing with them. This case therefore may raise the questions treated as doubtful by Lord Loreburn, L. C., in *Conway v. Wade*, [1909] A. C. 506, 510, his judgment being concurred in by Lord Macnaghten. He said: "But suppose one person simply induced some one not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe there has not been an exhaustive answer to that question. The further difficulty arises, what is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given,

and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together." It may further raise the question whether a threat to do an act which you have a lawful right to do can ever be actionable, even if actuated by motives of personal spite. On these matters we were referred to the mass of authorities and dicta, many of them contradictory, contained in at least ten House of Lords Cases, a larger number of decisions of the Court of Appeal, and a number of able and conscientious attempts by judges of first instance to state the results of decisions by which they are bound, and by which they should be enlightened. Of these *Pratt v. British Medical Association* [1919] 1 K. B. 244, per McCordie J., and *Valentine v. Hyde*, [1919] 2 Ch. 129, per Astbury, J., are recent examples on one side of the controversy, and *Hodges v. Webb*, [1920] 2 Ch. 70, per Peterson, J., on the other. I have read these cases, some of them several times, and find it quite impossible to harmonise them. The only tribunal which can hope to bring order into chaos is the House of Lords itself, and I do not think any useful purpose would be served by attempting to reconcile or criticise the conflicting statements in these cases. I can only state some points that appear to me to be fairly clear.

I take *Allen v. Flood*, [1898] A. C. 1, and *Bradford Corporation v. Pickles*, [1895] A. C. 587, to decide that an act otherwise lawful, though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. This is Lord Lindley's statement in *Quinn v. Leatham*, [1901] A. C. 533, of the effect of *Allen v. Flood*, [1898] A. C. 1. Therefore the reasons given by Lord Esher for deciding *Bowen v. Hall* (1881) 6 Q. B. D. 333, and *Temperton v. Russell*, [1893] 1 Q. B. 715, in the way he did are erroneous. This is stated by Lord Macnaghten in *Quinn v. Leatham*, [1901] A. C. 508. I take the *Mogul Case*, [1892] A. C. 25, as deciding that a combination to do acts, the natural consequence of which was to injure another in his business, was not actionable, if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining. I understand *Quinn v. Leatham*, [1901] A. C. 495, to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable, and I must take it that the noble Lords who decided *Quinn v. Leatham*, [1901] A. C. 495, thought that the acts there proved were subject-matter which might reasonably justify the finding of the jury. Of those acts the inducement to break an existing contract with *Dickie* would clearly support an action, but I have great difficulty in seeing why the other acts were not in furtherance of the trade interests of the combiners.

The workmen took the view that it was important for the interests of workmen that all members of their trade should be members of their union. They therefore endeavoured (1) to persuade employers

to employ only union workmen by stating that, if they did not, union workmen would not work for them. But some masters employed no union workmen; the union therefore endeavoured to induce them to change their system and employ union men by informing them that, if they did not, the union would persuade people who dealt with them not to continue to deal with them. (2) In pursuance of this combination the union informed a large customer of the employer that, if he continued to deal with the employer, all union men working for him would be withdrawn. These combined acts would appear in effect to be a statement to the employer Leathem and to his customer Munce: "Choose between on the one hand continuing to deal with each other, and having to work without union men, and on the other hand Munce's stopping dealing with Leathem, and enjoying the advantage of union men, and Leathem dismissing his present men and employing only union men." The facts would seem to be very similar to the facts in the Glasgow Fleshers' Case, 35 S. L. R. 645, where a combination of butchers informed auctioneers that no butcher would buy from them if the auctioneers sold to the co-operative stores, this course being taken to protect the interests of the butchers, by driving their competitors, the co-operative stores, out of business. But Lord Lindley in *Quinn v. Leathem*, [1901] A. C. 539, describing the action of the butchers as "threats," said, "There was nothing unlawful in this," and stated the distinction in these words: "The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to show."

I am quite unable to understand the distinction between the two cases, or to see why the "threats" in the Glasgow Fleshers' Case, 35 S. L. R. 645, were not like the "coercion" Lord Lindley speaks of in *Quinn v. Leathem*, [1901] A. C. 539. McCardie, J., whose judgment in *Pratt's Case*, [1919] 1 K. B. 244, 264, seems to me to reach the extreme limit on one side of the controversy, can only say of the Glasgow Fleshers' Case, 35 S. L. R. 645, first, that it illustrates the difficulty of this branch of law; secondly, that Lord Lindley gives the sound explanation in *Quinn v. Leathem*, [1901] A. C. 539. But Lord Lindley speaks of the action of the butchers as "threats," while McCardie, J., had just been pointing out, [1919] 1 K. B. 264, that "any element of threat" made actions unlawful. I respectfully concur on this point with the admirable judgment of Holmes, J., in *Vegeahn v. Guntner*, 167 Mass. 92, 107, 44 N. E. 1077, 1081 (35 L. R. A. 722, 57 Am. St. Rep. 443) where he remarks that the unlawfulness of "threats" depends on what you "threaten," and of "compulsion" on how you "compel." If you may lawfully do a thing it cannot be unlawful to say

you are going to do it; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way.

In my humble judgment the discussion of this question would be much more lucid if the disputants would observe certain simple rules: First, to avoid question-begging epithets, such as "boycotting," "ostracism," "the pillory," "coercion," and the like. Secondly, when they use the word "maliciously" to say in what sense they use it, whether as connoting personal spite, or intentional action from which harmful consequences to another must follow, or mere unlawfulness. Thirdly, to have in mind the criticism of Bowen, L. J., in the *Mogul Case*, 23 Q. B. D. 612, approved by Lord Watson in *Allen v. Flood*, [1898] A. C. 93, on the use of the words "wrongfully," "injure," "maliciously." I cannot think it really helps the matter to say that "wrongfully and maliciously" to do something gives a cause of action: *Quinn v. Leathem*, [1901] A. C. 505. "It is illegal to do wrong," does not carry us very far. Nor is it useful to say that intentionally to employ unlawful means is unlawful (*Pratt's Case*, [1919] 1 K. B. 260), especially when it is added that means may be unlawful though no act composing the means is unlawful. I do not myself think it helps the discussion to say that, though damage and not conspiracy is the gist of the action of conspiracy (Bowen, L. J., in the *Mogul Case*, 23 Q. B. D. 616), yet conspiracy will make an act causing damage unlawful which would be lawful if done by one. I respectfully agree with FitzGibbon, L. J.'s view to the contrary as expressed in *Sweeney v. Coote*, [1906] 1 I. R. 51, 109. The decision was affirmed in *H. L.* [1907] A. C. 221. Conspiracy appears to me to become actionable when the end is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage, and not to be actionable when neither the end nor the means are unlawful.

It is said that the end is unlawful if it is to cause damage to another. My comment on this is that it is not true. One may stop underground water from flowing into the land of another, intending to damage him; one may erect a hoarding to block out light from the windows of his newly erected house, intending to damage him; one may open a shop next door to him, and intentionally ruin him by selling similar goods to his at unprofitable prices; and none of these things (and many other instances may be given) are unlawful. It is attempted to explain these cases by saying that there is in each case just cause or excuse for damaging another. The question really is, have you a right to do the act complained of? If you have, it is immaterial that it injures another. In some specified classes of cases, such as nuisance, the lawfulness of the act may depend on whether you injure another. A man may make an offensive smell on his own land, but will be stopped if the smell becomes a legal nuisance on the land of another. There is here a legal injury to another, and the creation of such a smell is an unlawful act. But this cannot, in my view, be extended by saying a man has a right to trade, and therefore every one must trade with him, and refusal to

do so is an unlawful act; and no one may compete with him, and injurious competition is a wrongful act, because it injures him in his trade.

Apart from considerations of the binding effect of decisions of the House of Lords, the statements of opinion that seem to me personally most enlightening and accurate are the judgment of Lord Herschell in *Allen v. Flood*, [1898] A. C. 114, the opinion of Wright, J., in the same case, Id. 62; the admirable judgment of Holmes, J., in *Vegeahn v. Guntner*, 167 Mass. 104, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443 [A dissenting judgment, but the courts of other jurisdictions are of course free to prefer it.—F. P.], and the judgment of Peterson, J., in *Hodges v. Webb*, [1920] 2 Ch. 70. But I am, of course, bound by decisions of the House of Lords, and amongst others by the decision in *Quinn v. Leathem*, [1901] A. C. 495. I take that case to decide that, while combinations intended to secure the interests of the confederates in their trade by reasonable and legitimate means are not actionable, combinations which exceed this limit and cause damage by action intended to injure are actionable.

If so, the question in this case is whether a combination (1) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2) to inform the confederates who such persons are by means of a stop list; and (3) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is. While low prices may be good for the public for the time, they are not a benefit if all the suppliers are thereby ruined. A steady level price may have considerable advantages over violent fluctuations from very high prices in times of scarcity, and fierce competition and unremunerative prices in times of plenty or financial pressure. This combination seems to me at least as unobjectionable as the combination in the *Mogul Case*, [1892] A. C. 25, which was intended to drive a particular shipowner out of the trade. So far therefore as the injunction prevented the publication of a stop list calculated to prevent any persons from dealing with the plaintiffs, I think it should not have been granted.

There is more difficulty as to that part of the injunction directed against publication calculated to induce persons to break their contracts with the plaintiffs. The defendants' by-laws contemplated that contracts made by members of the association, before they became such members, should be carried out in spite of the stop list. It was assumed that, on becoming members, traders would only make contracts which could be terminated if the other contracting party appeared in the stop list. The association did not consider what would happen to contracts made without the power of cancelling contemplated by the by-laws. It is clear law that a combination to induce persons to break contracts is actionable. *South Wales Miners' Federation v. Glamorgan*

Coal Co., [1905] A. C. 239; Larkin v. Long, [1915] A. C. 814; Lumley v. Gye, 2 E. & B. 216. And I think the defendants would be well advised to make it clear in any future stop list that existing contracts, not containing a power of terminating them, must be carried out in spite of the stop list. But at the trial there was no evidence that any existing contracts had in fact been broken, and there was evidence that the association had informed any persons of whom they knew who had such contracts that they might be carried out. I appreciate that the association did not at first take this position, but in view of the state of things at the trial and the action of the defendants, the absence of any damage in fact, and the failure of the plaintiffs in the most substantial part of their claim, I do not think it necessary to grant an injunction on this minor point. I do not think there is any risk of future damage under this head. * * *

In view of the result already arrived at it is not necessary to express a final opinion on the cross-appeal, but as the question involved is of some importance I state my present view. The cross-appeal by the plaintiffs is against the decision of Rowlatt J. that the action will not lie against the Motor Trade Association because they are a trade union, in view of section 4 of the Trade Disputes Act, 1906. This section provides that "an action against a trade union * * * in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." The cross-appeal was rested on the ground that this did not prevent an action for an injunction, and this in turn was supported by two Chancery decisions, Attorney General v. Hackney Local Board, L. R. 20 Eq. 626, and Flower v. Leyton Local Board, 5 Ch. D. 347. The latter case allowed proceedings for an injunction without complying with the formalities of section 264 of the Public Health Act, 1875, which provided that a "writ or process" should not be served without one month's previous notice.

The explanation of this may be that "writ or process" was not the correct term to apply to a bill in equity. But I notice that when all these statutes imposing conditions on proceedings against public authorities were consolidated in the Public Authorities Protection Act, 1893, the language used was: "Where any action * * * or other proceeding is commenced in the United Kingdom" certain conditions shall be fulfilled. In 1898 in Harrop v. Ossett Corporation, [1898] 1 Ch. 525, it was attempted to argue that the section only applied to the same actions as the Public Health Act, 1875, and did not prevent proceedings in the Chancery Divisions to obtain injunctions. But Romer, J., took the view that "action" covered all actions in the Chancery Division, whether for an injunction alone, or accompanied with damages. In my view the word "action" in the Trade Disputes Act, 1906, has the same meaning. The section however uses the terms "an action * * * in respect of any tortious act alleged to have been committed." I cannot think these words were intended to exclude an

action "in respect of" a tortious act threatened to be committed. The words "in respect of" seem framed with intentional width to cover all remedies asked for in relation to a tortious act, whether committed or about to be committed. It was clearly intended that a trade union should as such be free from liability for damages for tort.

A request for an injunction may be dealt with by the courts, leaving the party to his remedy in damages, which, however, could not be given against a trade union. I cannot think that Parliament intended to allow injunctions to be granted in respect of acts for which, when done, no damages could be claimed, and therefore, though I feel I am straining the language of the Act, I must read "alleged to have been committed" as including allegations that trade unions are about to commit tortious acts.

The appeal should in my opinion be allowed, and the cross-appeal dismissed, in each case with costs, and judgment entered for all defendants with costs.¹⁸

COTE v. MURPHY.

(Supreme Court of Pennsylvania, 1894. 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686.)

Action to recover damages alleged to have been sustained by reason of a conspiracy between defendants.

DEAN, J. The defendants were members of the Planing Mill Association, of Allegheny county, and Builders' Exchange, of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association, or of the Builders' Exchange. There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers, wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause

¹⁸ A part of this opinion, relating to the defendant's liability for libel, is omitted, as are the statement of facts and the opinions of Lords Justices Bankes and Atkin.

of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle.

The two associations already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the association or not, in the furtherance of the one object,—resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen.

The strike continued about two months. After it was at an end, the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials, themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of \$2,500 damages, which the court reduced to \$1,500; then judgment; and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The mechanics of Pittsburgh, engaged in the different building trades, on the 1st of May, 1891, demanded that eight hours should be computed as a day, in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or a laborer, in this commonwealth, to fix such value on his services as he sees proper, and under the Constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept. But in this case the workmen went further. They agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law, this last was a conspiracy, and indictable, but under the acts of 1869, 1872, 1876, and 1891, employes, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by force, or menace of harm to person or property; but the strike here was conducted,

throughout, in a lawful, orderly manner. The employers—contractors and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged—refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power, this agreement was carried out. This, clearly, was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen.

Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators, in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues for damages, members of another combination, who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work, until the demand is conceded. The employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the same business from doing so.

Then the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances, he paid more to wholesale dealers, and put in more time buying, than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer. True, he avers that if defendants had gone no further than to refuse to sell, themselves,

he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned.

We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source—a contest between employers and employed as to the price of daily wages,—and then the further fact that this contest, instead of damaging him, resulted largely to his profit.¹⁹

LAWLOR v. LOEWE.

(Supreme Court of the United States, 1915. 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341.)

Mr. Justice HOLMES delivered the opinion of the court:

This is an action under the Act of July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, Comp. Stat. 1913, §§ 8820, 8829, for a combination and conspiracy in restraint of commerce among the states, specifically directed against the plaintiffs (defendants in error); among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in 208 U. S. 274, 52 L. Ed. 488, 28 Sup. Ct. 301, 13 Ann. Cas. 815, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other states, and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states. The case now has been tried, the plaintiffs have got a verdict, and the judgment of the district court has been affirmed by the Circuit Court of Appeals. 126 C. C. A. 445, 209 Fed. 721.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 58 L. Ed. 1490, 34 Sup. Ct. 951. Whatever may be the law otherwise, that case establishes that, irre-

¹⁹ A part of the remainder of this opinion is printed post p. —.

spective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the states.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters, made use of such lists and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe v. Lawlor*, 208 U. S. 274, 299, 52 L. Ed. 488, 500, 28 Sup. Ct. 301, 13 Ann. Cas. 815. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask any one to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers v. United States*, 233 U. S. 604, 58 L. Ed. 1115, 34 Sup. Ct. 693. By the Constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats.

The Federation of Labor, with which the Hatters were affiliated, had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public, especially among the members, in every possible

way. If the words of the documents, on their face and without explanation, did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the states. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in act.²⁰

Judgment affirmed.

GRAHAM v. ST. CHARLES ST. R. CO.

(Supreme Court of Louisiana, 1895. 47 La. Ann. 1656, 18 South. 707, 49 Am. St. Rep. 436.)

MILLER, J. The plaintiff, the proprietor of a grocery near the station house of the defendant company, sues for damages, alleging that the foreman of the company, also a defendant, has injured plaintiff in his business by dissuading the employés of the company under defendant's charge from dealing with the plaintiff, threatening them with discharge from the company's employment if they did so, and carrying the threats into effect. The petition charges that this conduct of the foreman has been persistent, prompted by ill will against plaintiff and the desire to injure him, and has resulted in diverting the business of the employés from plaintiff. It is further charged that plaintiff, by this course of conduct on the part of the foreman, has been annoyed and humiliated by the notoriety of the persécution, and the ridicule thereby engendered, to use the language of the petition, for which punitive damages are claimed; and the liability of the company is put on the ground that the acts and conduct of the foreman were in the course of the employment of the foreman intrusted by the company with the power to employ and discharge those in its service, placed under his control. The case was before this court on a previous appeal from the decision against plaintiff on the exception of no cause of action; and was remanded for trial on the merits. The defense on the merits is the general issue, and from the verdict and judgment thereunder against defendants this appeal is

²⁰ The remainder of the opinion considering the conduct of the trial and the measure of damages is omitted.

prosecuted by them. Plaintiff, answering the appeal, asks that the damages awarded, \$175, be increased.²¹

The ground of his [the foreman's] liability is that, from motives of ill will, by words and conduct, he injured plaintiff's business, by preventing the employés from buying at his store. Our review of the testimony satisfies us that the foreman urged a number of the employés not to deal with plaintiff; threatened them with discharge if they did so; raised the rent of premises he leased to one of the employés who dealt with Graham, assigning that as the cause for the increase. For the same reason, it is our conclusion from the testimony, he gave another tenant of his notice to quit, and, as to two instances of discharges, the testimony strongly points for the cause to the fact that the discharged men bought of plaintiff. There is also testimony that the foreman, in his efforts to dissuade one of the men from buying of plaintiff, used language in respect to him not at all flattering. The testimony comes from a number of witnesses, testifying to distinct acts, and to the conduct of the foreman on different occasions. It would serve no usual purpose to give the testimony in detail. We have given attention to that of the foreman that he never gave orders to the men not to deal with plaintiff, and that his motive was to prevent drinking by the men during their hours of service. We have considered the testimony of the employés produced by defendant, that they dealt with plaintiff and were not discharged, and that there were posted in the station stringent rules against drinking by the employés; but a careful consideration of the testimony impresses us, as, we must conclude, it did the jury, that the defendant did use efforts to divert employés from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company.

The right of protection to the citizen in the pursuit of the avocations by which he gains his livelihood is as important as the security of his person and property. No man is privileged to injure another in his business. If the defendant Newman by his conduct and language sought to create a prejudice or feeling against plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff. Nor is that reparation to be measured by proof of actual damage. Every act of man that causes damage to another obliges the wrongdoer to restitution, is the language of the Code, requiring the obvious qualification that the act must be wrongful; and in the assessment of the damages the exercise of the discretion of the jury or court is admitted. Civ. Code, arts. 2315, 1933; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Edwards v. Turner*, 6 Rob. (La.) 382; *Fenner v. Watkins*, 16 La. 206; *Wardens, etc., v. Blanc*, 8 Rob. (La.) 84; *McGary v. City of Lafayette*, 4 La. Ann. 440. The fact that the defendant's tenant had a grocery in the neighborhood,

²¹ So much of the opinion as relates to the liability of the corporation and concerns damages is omitted.

apt to be benefited by a diversion of plaintiff's customers, supplies the motive of interest, but does not, in our view, at all mitigate his conduct.

With all reasonable allowance for the competitions of trade, and the means by which the shopkeeper or merchant obtains business, words and actions to discredit and injure a rival in business cannot be tolerated. The circumstance that the defendant, as the foreman of the company, had the power to discharge those designed to be influenced by his communications or statements with respect to the plaintiff, and that defendant had the selection of the labor of the company, tended to make more effective his efforts to injure plaintiff in his business. We recognize the principle, urged by the defense, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their discharge. The authority cited by defendant is entitled to full recognition, that one may do business with those he chooses to deal with, and decline, if he pleases, the business of others. *Orr v. Insurance Co.*, 12 La. Ann. 255. It is not the exercise of defendant's choice in selecting or discharging laborers for the company that makes him liable, but he is responsible because, in exercising that right, he indulges in language, uses threats, and pursues a line of conduct all directed at the plaintiff, and of a character to injure him in his lawful business. * * *

It is therefore ordered, adjudged, and decreed that the judgment of the lower court against the company be avoided and reversed, and that the judgment against Thomas Newman be affirmed, and that he pay costs.

LONDON GUARANTEE & ACCIDENT CO. v. HORN.

(Supreme Court of Illinois, 1903. 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185.)

Action by Gustave Horn against the London Guarantee & Accident Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (101 Ill. App. 355), defendant appeals. * * *

Appellee, on January 7, 1899, was in the employ of Arnold, Schwinn & Co., of Chicago, as foreman of the frame department of its bicycle factory, and on that date, while engaged in his work, was injured while attempting to operate a milling machine, from which he suffered the loss of two fingers on his right hand. At the time of this injury Arnold, Schwinn & Co. carried an indemnity policy in the London Guarantee & Accident Company, indemnifying said firm against loss from injuries to its employés. * * *

Appellee brought suit against Arnold, Schwinn & Co., in which a verdict was subsequently rendered for \$3,500, from which judgment an appeal was taken, which was pending at the time of the trial of this case. Pending that suit, and on June 26, 1899, Robinett, representing the guarantee company, called at the factory of Arnold, Schwinn & Co., where appellee had been re-employed, and in the presence of O'Connell, manager of the factory, offered appellee \$100 in settlement of his claim, and told him that unless he accepted that amount he would have him discharged by Arnold, Schwinn & Co. Appellee refused the offer. * * * Robinett then said to O'Connell, in the presence of appellee, that O'Connell would have to discharge Horn, as he refused to give appellant a release. O'Connell expressed the view that he did not have to discharge him, and after a reference to the contract of insurance said there was nothing in that which required him to discharge Horn if he refused to give a release. To this view Robinett assented, but said: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day, and if you refuse to lay him off I will cancel it; that's my orders." * * * Horn was discharged and paid off on the following day.

The Appellate Court finds that appellee's employment was not for any particular time, but Arnold, Schwinn & Co. did not desire to discharge him; that the firm had regular work for him, desired to retain his services as a foreman indefinitely, notwithstanding the suit pending against it, and discharged appellee solely because of appellant's demand, and because of its threat to cancel its policy of insurance in case of a failure to comply with that demand.

Appellee brought this suit to recover damages against appellant upon the theory that the facts above set forth showed that appellant had maliciously caused his discharge from his employment by the wrong-

ful acts of its agents, and that such conduct constituted an actionable wrong, for which appellant was liable in damages to appellee.²²

SCOTT, J. * * * Under these circumstances, does a cause of action exist in favor of appellee and against appellant? The result of this suit depends upon the answer to this question. [The following cases are here reviewed: *Allen v. Flood*, 67 L. J. Q. B. 119; *Mogul Steamship Co. v. McGregor*, 21 Q. B. D. 544; *Huttly v. Simmons*, 67 Q. B. D. 213; *Quinn v. Leathem*, [1901] App. Cas. 495.]

We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment, or business is such a justification, is in accord with the authorities. This view finds support in the case of *Chambers v. Baldwin* (Ky.) 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165, where it was held that a party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, the superintendent of a stone quarry had given one Libersont leave to go upon the quarry and cut some of the poorer granite. Libersont employed the plaintiff to assist in this work. Defendant had a right to terminate Libersont's license at any time, and Libersont's employment of plaintiff could be terminated by either of the parties thereto at any time. The defendant had a personal difficulty with the plaintiff, and thereupon induced Libersont to discharge him, threatening if Libersont did not do so he (the defendant) would revoke the leave which Libersont had to take granite. The court holds that no right of action existed, putting the conclusion on the ground that the defendant had the undisputed right to determine who might remain and work upon the quarry, and that he could have revoked Libersont's license for the express purpose of removing the plaintiff, and, that being true, he could also lawfully require Libersont to discharge the plaintiff or leave the quarry; but it is said that "the authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor." The decision plainly proceeds upon the theory that the defendant had a right superior to the right of Libersont to determine who should be employed at the quarry in question.

In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who

²² The statement of facts is abridged and parts of the opinion are omitted.

secured the discharge of the employé was in some way in competition with that employé in the business or work in which the employé was then engaged, or was a member of some organization which was in competition with the employé or some organization to which that employé belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. In fact, appellant seems to take this view, for it devotes a considerable portion of its argument to an attempt to show that plaintiff and defendant were in competition with each other, in that appellant desired to secure or satisfy the alleged right of action of appellee for the least possible sum, while appellee desired to secure for that right of action the greatest possible sum.

Counsel seem to have been impelled to this view of the matter by the dissenting opinion of Mr. Justice Holmes in *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, where, in discussing the proposition that one man may set up a business in competition with another with the intention and expectation of ruining another already engaged in that business in that locality, and if he succeed in his intent is not held to act unlawfully and without justifiable cause, Justice Holmes used this language: "If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy [that of permitting free competition] is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which look upon competition as a justification for the act of one party in securing the discharge of an employé have regarded the term in a more restricted sense, and given to the term "competition" its ordinary meaning and signification. This conclusion is certainly warranted by the reasoning in *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 68 Am. St. Rep. 203, where this court discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be

presented, and *Allen v. Flood*, *supra*, and other cases of that character cited by appellant, would then be worthy of greater consideration.²³

Arnold, Schwinn & Co. had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between Arnold, Schwinn & Co. and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ "all the year around," that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable.²⁴

We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employé who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employé and to benefit himself at the expense of the employé by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employé against the third party. * * *

Judgment affirmed.²⁵

²³ The court here discussed whether the facts showed "legal malice."

²⁴ A further review and citation of cases are omitted.

²⁵ The dissenting opinion of Wilkin and Cartwright, JJ., is omitted.

CHAPTER VII

REQUIRING EXCLUSIVE DEALING

VAN MARTER v. BABCOCK.

(Supreme Court of New York, 1857. 23 Barb. 633.)

Motion on the part of the defendants for a new trial; ordered to be heard in the first instance at a general term. The action was brought to recover damages for an alleged breach of a contract between the parties.¹

The breach of the contract assigned in the complaint was, that the defendants refused to receive and pay for the plaintiff's crop of oil of peppermint raised on all his lands and on said twenty-three acres in the year 1848, which the plaintiff averred to be two hundred pounds of oil, which oil, as he alleged, he delivered at the time and place in said contract named, and tendered to said defendants, which they refused to receive and pay for, and that said oil of peppermint was then and there worth only the sum of nine shillings per pound.

The defendants' answer set up several defenses, claiming, among other things, that the contract was made in restraint of trade, and was against public policy, and void. * * *

WELLES, J. The only question of any importance, is upon the validity of the agreement between the parties, of May 14, 1847, which is above set forth. We think all the other rulings upon the trial were correct; and that they do not, any of them, require particular consideration.

It is a well-settled rule of the common law, that contracts in restraint of trade are illegal and void, upon the ground that they are contrary to public policy. But such restraint, to be illegal, must be total, either for a limited time or generally. If the limitation be to a particular locality only, the restraint is not unlawful. Comyn on Cont. pt. 1, c. 4, p. 55; Id. pt. 2, c. 10, p. 438; Mitchell v. Reynolds, 1 P. Wms. 181. The theory seems to be, that as the prosecution of trade advances the public welfare, the law will not enforce any contract which necessarily diminishes the business and industry of the country. But as it is of no consequence to the public, where a man carries on his trade or occupation, within the state, provided he is not prohibited from doing so at all; the law recognizes as valid, or as not in contravention of the principle under consideration, any contract which only restricts him to, or excludes him from, a particular locality for the prosecution of his trade. See Gale v. Reed, 8 East, 80.

Does the contract in this case fall under the condemnation of the

¹ The terms of the contract, here omitted, are stated in the opinion.

rule in question, as thus stated and explained? The agreement appears to consist of two distinct parts, having two separate objects in view. In the first place the plaintiff agrees to sell to the defendants all the mint oil which is produced upon twenty-three acres of peppermint then growing, the parties agreeing that the contract should include and cover all the oil of peppermint which the plaintiff should raise, grow or distill, or in any way produce or be interested in the production of, for two years from the date of the contract; the defendants agreeing to take the same at a price agreed upon in the contract. So far, it cannot be contended there was any restriction upon the plaintiff as to the quantity of oil he was at liberty to manufacture or produce; on the contrary, he was left at liberty to produce all he chose and where he pleased. The extent of his obligation was to sell the defendants all he should produce, &c. within the specified time.

In the next place the plaintiff agrees to discontinue his interest in the production of peppermint oil (with the above exception) until the first of March, 1849, and agrees not to sell, give or barter away any peppermint roots to any person whatever, until the time last mentioned, and not to distill for any other person, &c., excepting for those who shall have contracted for their oil of peppermint to the defendants, nor to sell, rent or give away his distillery or the use of it, &c. for two years; and that no peppermint roots except two acres, &c. shall be grown, or oil distilled, on any part or portion of his farm or farms, or lands occupied by or for him, until the first of March, 1849, excepting for the production of the oil of peppermint as sold by him to the defendants under the same contract. It will be perceived that the exceptions contained in this latter part of the contract, entirely neutralize all expressions or language contained in the instrument, from which a total restraint could be inferred. All the rights which the first part of it secures to the plaintiff are, in the second, fully preserved. Among them, was the right to manufacture and produce all the peppermint, or the oil thereof, which he was able or chose to manufacture or produce, without restriction. He was only bound to let the defendants have it all at the price stipulated. If they refused to take it all, he would be released, and at liberty to sell it elsewhere. If they received and paid for it according to the contract, no harm would be done to any one. It is impossible to discover that in either event, or in any aspect, there was anything like such a restraint upon the plaintiff in his business or trade, as the law prohibits.

There is no foundation for the position now taken, that the contract was by its terms and under the proof, part of a scheme for monopolizing the trade in peppermint oil, and was illegal and void under the statute against conspiracies to restrain trade and commerce. 2 R. S. 691, pt. 2, § 8, subd. 6. All there is in the contract to afford any color for this objection, is a provision at the close of it, declaring the contract void unless the growers generally enter into an agreement with the de-

fendants; but it is silent as to what agreement is intended or contemplated. It would be too much, to hold the contract illegal, upon an inference merely, that the contract with the growers was to be of an illegal tendency. In reference to whatever of evidence there was upon the trial to support the objection, the justice was not requested to submit the question to the jury, or to give any instructions on the subject, and the verdict settles the question of fact, in favor of the plaintiff, and, as we think, correctly.

The motion for a new trial should be denied, with costs, and an order entered that the plaintiff have judgment upon the verdict. Ordered accordingly.

NEWELL v. MEYENDORFF.

(Supreme Court of Montana, 1890. 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738.)

DE WITT, J. The record in this case presents the following history: The complaint is for the price of cigars sold and delivered by plaintiffs to defendant. Defendant answered, and admitted the sale and delivery, and set up in recoupment a contract, the terms of which were, generally, that in 1886 he was dealing in cigars; that plaintiffs approached him to sell their "Flor de B. Garcia Cigars," agreeing that defendant should have the sole and exclusive right of selling, handling and dealing in said cigars in Montana; that plaintiffs would not sell said cigars to any one else in the territory; that defendant would cease advertising and selling various other valuable brands of cigars in which he was dealing, and from the sale of which he was deriving much profit; that he would accept said sole agency, would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof to the best of his ability. The answer further alleges, in detail, the performance by defendant of his part of the contract, and the expenditure of large sums of money in placing said cigars upon the market. Then follows the allegation of breach by plaintiffs, in that they sold the said brand of cigars to other dealers in the territory, by which breach the defendant suffered great damage in his business, which damage he recoups against the plaintiff's account for the cigars sold.

The court below sustained a demurrer to this answer, on the ground that the contract pleaded was void, as against public policy, being in restraint of trade, and could not be pleaded in recoupment. Defendant accepted the ruling of the court, and took leave to amend, which he did by pleading the same contract, not in recoupment, but as an absolute defense, on the ground that, if the contract were void, the plaintiffs could not recover thereunder. The case went to trial in this condition, before the court without a jury. The theory of the case seems to have been preserved until the court made findings and conclusions of law, at which time he held that the contract was not void. Defend-

ant presumably had not introduced evidence of damages by reason of breach, as he was not entitled to under the pleadings; and judgment was made and entered for plaintiffs for the amount claimed. Defendant seems not to have had a day in court. His motion for a new trial was denied. From that order, and the judgment as well, he appeals; having saved his errors complained of by exception.

We will first construe the contract as to whether it must be considered void as in restraint of trade. The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances. In *Alger v. Thacher*, 19 Pick. 51, Morton, J., says: "As early as the second year of Henry V (A. D. 1415) we find, by the year-books, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned, till the present time." The learned judge traces the history of the rule to its modern modification, that "contracts in restraint of trade, generally, have been held to be void; while those limited as to time or place or persons have been regarded as valid, and duly enforced." He gives the reasons for the rule in the following language: "(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such person to imposition and oppression. (2) They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition, and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." See, also, cases in that opinion cited.

The doctrine is again well stated in *Lawrence v. Kidder*, 10 Barb. 641, in which case the court, Selden, J., cites with approval *Bronson, J.*, in *Chappel v. Brockway*, 21 Wend. 157, as follows: "There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid." In *Navigation Co. v. Winsor*, 20 Wall. 68, Mr. Justice Bradley says: "There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both

these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

We have cited these reasons for the rule in full, in order to apply them to the contract under construction. They embody the modern doctrine, as held by the authorities. A recitation alone, of the rule and its reasons, seems to us sufficient to take the contract under consideration out of the operation of its prohibitions. The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiffs' industry, by the selection and services of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs, by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reasons therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract, for a consideration, for the enlistment of the services of an agent for the plaintiffs in their business. The court below was therefore correct in his last view of the contract. It follows that he was wrong in his first position in sustaining the demurrer to the original answer.²

PHILLIPS v. IOLA PORTLAND CEMENT CO.

(Circuit Court of Appeals of the United States, 1903. 125 Fed. 593, 61 C. C. A. 19.)

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is a writ of error to review a judgment for the plaintiff below, the Iola Portland Cement Company, a corporation, against Thomas H. Phillips, in an action for damages for the breach of a contract of sale of cement. The company was a manufacturer of cement in the state of Kansas. The defendant below, Phillips, was a member of the copartnership of William Parr & Co., who were merchants engaged in business at Galveston, in the state of Texas. On January 24, 1901, Parr & Co. made a contract with the cement company whereby they agreed to purchase of it

² The remainder of the case, relating to questions of procedure, is omitted.

during the year 1901, 50,000 barrels of Iola portland cement to be delivered free on board the cars at Iola, in the state of Kansas, and to pay therefor \$1.20 per barrel. They further agreed "not to sell said cement, ship same, or allow same to be shipped," outside of the state of Texas. Under this contract they accepted and paid for 24,580 barrels of the cement, and refused to accept 25,420 barrels thereof. The cement company brought an action against them to recover the damages which it sustained by the failure of the purchasers to accept and pay for these 25,420 barrels, and Phillips, the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins v. U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Northern Securities Co. (C. C.)* 120 Fed. 721, 725.

The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for

the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the Act of July 2, 1890.

For a more extended consideration of the principles upon which this decision is based, for a citation, review, and analysis of the authorities which sustain them and which compel the ultimate conclusion which we have reached in this case, reference is made to the opinion of this court in *Whitwell v. Continental Tobacco Co.* (which is filed herewith) 125 Fed. 454. A repetition of the citation and review of authorities, and of the more exhaustive discussion³ of principles there indulged in, would be useless here, and it is omitted.³

The judgment below is affirmed.

GEORGE & CHAPMAN v. EAST TENNESSEE COAL CO

(Supreme Court of Tennessee, 1885. 15 Lea, 455, 54 Am. Rep. 425.)

DEADERICK, C. J., delivered the opinion of the court.

Plaintiffs sued the defendant in the circuit court of Knox county for breach of contract. Plaintiffs were merchants, and defendants had miners and workmen employed. The contract, as averred in plaintiffs' declaration, was, that defendants should furnish plaintiffs the trade of their miners and workmen, and in consideration therefor defendants should receive eight per cent. on sales to said miners and workmen, and either party might terminate the contract on giving six months' notice. Plaintiffs aver readiness and willingness to comply, and that both parties performed their part until March 1, 1883, when defendants opened a store of their own, and abandoned the contract without giving notice, by reason whereof plaintiffs were deprived of large profits, etc., to their damage, etc.

A second count, substantially like the first, sets out the manner by which they were to keep accounts and settle.

The defendants demurred. * * * The demurrer was sustained, with leave to amend. Plaintiffs filed an amended declaration averring a contract to furnish goods, etc., and condition that either party might terminate it by six months' notice, also averring performance

³ The remainder of the opinion, dealing with other questions, is omitted.

and readiness to perform by plaintiffs, and breach, without notice, by defendants.

In a second count plaintiffs set out the facts that defendants were mining coal, having a large number of employés, and having a contract with said miners and workmen to receive, in part payment of their wages, goods, wares, and merchandise and provisions, contracted with plaintiffs for the exclusive supply from plaintiffs' store for such supplies, which plaintiffs were always ready and willing to furnish, in consideration of which defendants were to receive eight per cent. on all sales to said employés, with liberty to either party to rescind the contract on six months' notice.

The plaintiffs then aver that defendants withdrew without giving notice, cutting off a large trade with said miners and employés for six months, to their damage, etc.

Defendants again demurred, and the demurrer was sustained, suit dismissed, and plaintiffs filed the record for writ of error. The causes of demurrer are: First. Because plaintiffs do not aver that they were able or willing to perform their part of the contract. * * * Second and third causes are that the contract sued on is nudum pactum; and void for uncertainty. * * *

The third and fourth causes⁴ are that the contract is against public policy, and the damages claimed too remote and uncertain. The court sustained the demurrer, and dismissed the bill, and the Referees recommend an affirmance of the decree, and plaintiffs except.

If the contract is prohibited by law, if it be immoral, or contrary to public policy, it cannot be enforced. A contract not to carry on one's trade anywhere is void. But a contract not to carry it on in a particular place, or within certain limits, is valid. 2 Parsons on Cont. 748. In note Z, citing numerous cases, showing progressive decisions from very early English cases to comparatively modern ones in that country and in this, the doctrine first held in the English cases is much qualified, and is as stated in the text. The same note cites the case of *Gale v. Reed*, 8 East, 80, very similar in its main features to this case. There A. and B. agreed to give C. two shillings on every hundred weight of cordage they should make, on the recommendation of C., for any of his friends and connections, C. binding himself not to carry on the business of a rope-maker. This was held to be a legal contract. We see nothing in this contract contrary to public policy. It is not in restraint of trade, nor immoral, nor contrary to law. Being a contract which the parties might make without violation of law, the demurrer to the declarations was improperly sustained. The plaintiffs, if the contract was made, and has been violated without excuse, would be entitled to some damages.

The report of referees will be set aside, the judgment reversed, and cause remanded for further proceedings.

⁴ Only so much of the opinion as relates to these causes is given.

WHITWELL v. CONTINENTAL TOBACCO CO.

(Circuit Court of Appeals of the United States, 1903. 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.)

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is an action by the plaintiff, Joseph P. Whitwell, to recover treble damages from the Continental Tobacco Company, a corporation, and from one of its employes, George E. McHie, under the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), on the sole ground that the defendants refused to sell the manufactured products of the tobacco company to him at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling, or handling plug chewing tobacco made by independent manufacturers who were competing with the tobacco company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employes a "contract, combination or conspiracy in restraint of trade" or an "attempt to monopolize any part of trade," within the meaning of the Act of July 2, 1890, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)?

An analysis of the averments of the complaint to which the court below sustained a general demurrer will demonstrate the fact that the crucial question in this case has been correctly stated. The material facts which those averments disclose are these: The plaintiff is a jobber of tobacco, and of the products of tobacco, at St. Paul, Minn. The tobacco company is a manufacturer and merchant, and McHie is its agent and employé. The tobacco company owns and controls most of the valuable and leading brands of plug and chewing tobacco in the United States, and fixes the market prices thereof. The company and its agent, McHie, had long been, and on May 1, 1902, still were, in the practice of selling its goods to jobbers in this way: They allotted to an intending purchaser an amount of its goods which he was required to buy during each succeeding period of four months. This allotment was much in excess of the amount which he would be able to sell during that time. They fixed the prices of the goods comprising the allotment so high that, if the purchaser paid the prices thus fixed, he could not make any profit by buying and selling the commodities. They required each purchaser to refrain from dealing in plug chewing tobaccos made by independent and competing manufacturers. If the purchaser complied with this requirement, they invariably reduced his allotment to the amount

he was able to sell, and paid back to him such a percentage of the aggregate price of the goods he bought that the handling of these commodities was by reason of this repayment alone made profitable to him. If the purchaser refused to comply with this requirement, they refused to reduce the amount of his allotment or the prices of his goods, so that the business was unprofitable to him.

The plaintiff had long participated in this method of transacting business, had been handling the products of the tobacco company in accordance with it, and had an established business in the purchase of tobacco and its products, and in the sale of them throughout the states of Minnesota, North Dakota, and South Dakota, when on May 1, 1902, the defendants made an allotment to him for the succeeding four months, and offered to furnish their commodities to him in accordance with their established practice. He, however, refused to refrain from handling the goods of independent manufacturers who were competing with the defendants. Thereupon the latter refused to reduce the allotment which they had made to him, or the prices thereof, so that the handling of the goods of the tobacco company would be profitable to the plaintiff, and he did not purchase, or agree to purchase, their goods. He was unable to procure them elsewhere, and sustained damages in the sum of \$280.

No other facts are stated in the complaint. There are, however, allegations that the defendants combined and conspired to regulate and to raise the prices of their goods, and to control the output thereof, with the intent to monopolize trade and commerce among the states of Minnesota and North Dakota and South Dakota; that they combined to arbitrarily fix the prices of their goods, independently of their natural market value, and to refuse to sell them on equal terms to all intending purchasers; and that they did all these things in restraint of trade and commerce among the states. But the only way in which the plaintiff avers that these defendants restrained or attempted to monopolize interstate trade, or disclosed their intent to do so, was by restricting the sale of their own goods to customers who refrained from handling the wares of their competitors by making their sales on the terms which have been stated. The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action. The only facts thus stated are that the tobacco company and its employé refused to make sales of its products to the plaintiff, or to others who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of its competitors. Was

this act, or the course of dealing which it illustrates, a violation of the anti-trust law of 1890?⁵

Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person. Act July 2, 1890, c. 647, §§ 1, 8, 26 Stat. 209, 210 (U. S. Comp. St. 1901, pp. 3200, 3202). Hence the real question in every case which arises under this law is whether or not the contract, combination, or conspiracy challenged is in restraint of trade among the states. It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law [citing cases].

If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation [citing and reviewing cases].

The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Hence agreements of competing railroad companies to intrust their power to fix rates of transportation to the same man or body of men (U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; U. S. v. Northern Securities Co. [C. C.] 120 Fed. 721), and contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, or the customers to whom he shall dispose of them, and either to fix these prices, terms, and customers by the agreement of the competitors, or to intrust the power to dictate them to the same man or body of men (U. S. v. Jellico Mountain Coal & Coke Co. [C. C.] 46 Fed. 432, 12 L. R. A. 753; U. S. v. Coal Dealers' Ass'n

⁵ The first two sections of the Sherman Act, here quoted, are omitted. The act will be found in the Appendix.

[C. C.] 85 Fed. 252; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 53 C. C. A. 250; *Gibbs v. McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Lowry v. Tile, Mantel & Grate Ass'n* [C. C.] 98 Fed. 817; *Id.* [C. C.] 106 Fed. 40; necessarily have the effect either to stifle competition entirely, or to directly and substantially restrict it, because such contracts deprive the rivals in trade of their best means of instituting and maintaining competition between themselves.

In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employé. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employé, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers.

The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. In *re Greene* (C. C.) 52 Fed. 104, 115; In *re Grice* (C. C.) 79 Fed. 627, 644; *Walsh v. Dwight* (Sup.) 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; *Commonwealth v. Grinstead* (Ky.) 63 S. W. 427; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832. There is nothing in the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which deprived any of these competitors

of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employé fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employé had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

The tobacco company and its employé sold its product to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competi-

tion in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated section 2 of the Anti-Trust Act, because it was an "attempt to monopolize. * * * part of the trade or commerce among the several states." It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly.

The purpose of the Act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (*Hopkins v. U. S.*, 171 U. S. 578, 600, 19 Sup. Ct. 40, 43 L. Ed. 290; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259), have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations. The Supreme Court has declared that the true construction of the first section is

that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states.

The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others.

The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed.⁶

J. W. RIPPY & SON v. ART WALL PAPER MILLS.

(Supreme Court of Oklahoma, 1913. 41 Okl. 20, 136 Pac. 1080, 51 L. R. A. [N. S.] 33.)

BREWER, C. The Art Wall Paper Mills, a corporation of Dallas, Tex., brought this suit in the district court against J. W. Rippy & Son, a copartnership, to recover the purchase price of certain goods, wares, and merchandise, sold and delivered in pursuance to a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried to a jury, and a verdict returned in favor of the plaintiffs. The defendants, plaintiffs in error here, bring up the case on case-made, and in their brief seem to rely upon the following alleged errors: First. Overruling defendant's demurrer to the petition. Second. Placing the burden of proof upon the defendant. Third. The exclusion of evidence offered by defendant.⁷

⁶ The facts in *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486 (1909), which case is printed post, p. —, are thus stated by Mr. Justice Holmes:

"This action is for goods admitted to have been sold and delivered by the plaintiff to the defendant, and the question arises, as has been explained, on demurrer to the third defense. The elements of that defense may be stated in a few words. Nearly all the manufacturers of wall paper in the United States formed a combination which, under the present policy of the law, was an illegal attempt to restrain and monopolize trade in and among the several states. As a part of the scheme the plaintiff corporation was created, which, by the agreement, became the purchaser of the products of the constituent companies, and was to sell the same, although the constituent companies continued to manufacture and to carry on the business of soliciting orders. The only material facts about this agreement are that under it the plaintiff got title to the goods, that it fixed prices at which goods were to be sold, and that it contemplated compelling the jobbers and others who bought to purchase at those prices, if they were to get any paper at all. The conspirators threatened, and had the power, to drive any jobber out of business who did not come in. In pursuance of the combination and its purpose the defendant, a jobbing house, and all other jobbers, were compelled to sign a contract which, in effect, bound them to buy all the wall paper needed in their business from the plaintiff at the above-mentioned prices, and which made it an 'essential condition of this agreement' that they should not sell at lower prices or upon better terms than those at which the plaintiff sold. After these two contracts were made the defendant ordered the goods in question at the prices named. It is alleged that those prices were unreasonable, and it is alleged, repeatedly and with much detail, that all the arrangements were made and all the business was done in furtherance of the plan set forth, contrary to the law of the United States and of the states concerned, and in violation of the defendant's rights, this suit being the final step in the attempt to carry out the plan."

The third defense was held sufficient by the majority of the court.

⁷ Only the part of the case relating to the first alleged error is given.

1. The defendants claim that plaintiff's petition is demurrable for the reason that the suit is based upon a certain written contract or trade agreement attached to and made a part of the petition, and which it is alleged shows upon its face that it is an agreement in restraint of trade and commerce, and is therefore void; and, that being void, the plaintiff cannot recover for the goods sold and delivered in pursuance of its terms. The portion of the agreement which it is claimed has the above effect is a provision inserted in it requiring the defendants to handle only the wall papers manufactured and kept for sale by plaintiff during the life of the contract, which was from April 5th to January 5th following. In other words, that the defendants agreed that for the limited period of time named in the contract they would buy all their wall papers from the plaintiff.

We do not believe that this agreement has the effect contended for. It is not pointed out, and from a reading of the contract we do not believe it can be pointed out, wherein this contract has the effect of restraining trade, or competition in trade, so as to bring it within the denunciation of the law. The plaintiffs are wholesale dealers in wall paper, and had traveling salesmen in Oklahoma and Indian Territory at the time this contract was made in 1904. The defendants are retail dealers in Oklahoma City. In return for defendant's agreement that for a certain period of time they would buy their wall paper exclusively from plaintiff, and would keep in stock a complete line of the same, the reciprocal agreement was made by plaintiff that its traveling salesmen, in the two territories named, would send their "stock fill in orders" to be filled from defendant's stock, and for which sales they received the profits. If plaintiff was going to give defendants the benefit of certain sales made by its traveling salesmen from samples of its line of papers in stock, it certainly was not unreasonable to require defendants to carry, for the time being, only its line of papers. It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties, rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. We think these views find ample support in the authorities.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade. *Threlkeld v. Steward*, 24 Okl. 403, 103 Pac. 630, 138 Am.

St. Rep. 888; *Trentman v. Wahrenburg et al.*, 30 Ind. App. 304, 65 N. E. 1057; *Brown v. Rounsavell*, 78 Ill. 589; *Live Stock Ass'n v. Levy*, 54 N. Y. Super. Ct. 32; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Olmstead v. Distilling & C. F. Co. (C. C.)* 77 Fed. 265; *Arnold Bros. v. Kreutzer & Wasem*, 67 Iowa, 214, 25 N. W. 138; *Kronsnabel-Smith Co. v. Kronsnabel*, 87 Minn. 230, 91 N. W. 892.

A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce. This view is fully sustained by the Supreme Court of the United States in various decisions.

In *Anderson et al. v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, it is said: "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith v. Alabama*, 124 U. S. 465, 473, 8 Sup. Ct. 564, 31 L. Ed. 508, 510, 1 Interst. Com. R. 804: 'There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefor void."⁸

The cause should be affirmed.

PER CURIAM. Adopted in whole.

⁸ A quotation from *Whitwell v. Continental Tobacco Co.*, ante, p. 589, is here omitted.

MERCHANTS' LEGAL STAMP CO. v. MURPHY.

(Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 389, 107 N. E. 969, L. R. A. 1915D, 520.)

Action by the Merchants' Legal Stamp Company against William H. Murphy and another. Decree dismissing the bill, and plaintiffs bring exceptions.

BRALEY, J. The principal if not the sole business of the plaintiff is the issuing of trading stamps to merchants at a fixed price who give them to their customers for cash purchases usually on the basis of one stamp for every ten cents of the price of the article bought, and after a number of stamps have been thus collected the merchant or collector presents them to the plaintiff for redemption at a fixed rate. By this arrangement the stamp or coupon operates as a discount in cash for every purchase made. *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385. The books containing the contract are described by the master as ruled off into spaces similar to stamp albums into which the collectors, who are also the purchasers, paste the stamps, and the plaintiff redeems them at a lower price; the difference measures the company's profits. It is plain that the plaintiff is a trading stamp company giving premiums or a valuable consideration for stamps furnished to purchasers of goods as an inducement for payment in cash. The master's report shows, that under the operation of this system the plaintiff controls nearly ninety per cent. of the actual business conducted in this form by the merchants of Boston and vicinity. By the provisions of the contract designed for this territory the company retains title to the book and stamps with an agreement by the authorized merchant or customer not to part with them except in the specified course of trade, and to return the book with the stamps attached which may have been presented to him by purchasers. If this is not done all rights under the contract cease or are forfeited.

We said in *O'Keeffe v. Somerville*, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, 5 Ann. Cas. 684, that trading stamps not being a commodity within the meaning of our Constitution they were not subject to an excise tax although no attempt was made to classify them. Nor is it necessary now to determine whether the contract is strictly a bailment. *Hunt v. Wyman*, 100 Mass. 198; *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266, 68 N. E. 224; *Isaacs v. MacDonald*, 214 Mass. 487, 102 N. E. 81. Or whether the stamps are choses in action. *Sperry & Hutchinson Co. v. Hertzberg*, 69 N. J. Eq. 264, 60 Atl. 368. The transaction is to be determined from its inherent character or purpose. If not goods, wares or merchandise as those terms ordinarily are used, or the title did not vest in the purchaser, but he had only a limited use, they do represent and were intended to represent a mode of doing business which under modern mercantile conditions is in itself a business potentially affecting and largely controlling certain well recognized lines of trade. The books and stamps when viewed in the

light of their manufacture and use by the plaintiff, coupled with its contract treating them not as symbols but as chattels of value which are the subject of sale or of bailment are to be deemed articles within the meaning of St. of 1908, c. 454, § 1. It is expressly found that the plaintiff declines to supply stamps to merchants unless they stipulate not to use trading stamps issued by other companies or individuals, and that the insertion of this provision in the contract is to suppress all competition. The direct tendency of the plaintiff's system of business under all the findings results in such concentration as to substantially control prices for a form of service, or of supposed profits to purchasers demanded by the public. *Com. v. Strauss*, 188 Mass. 229, 231, 74 N. E. 308.

The scheme the plaintiff has so carefully elaborated and built up is in reality a device whose predominant purpose shown by its practical and successful operation tends to drive all competitors from the field. *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 403, 78 N. E. 463; *United Shoe Machinery Co. v. La Chapelle*, 212 Mass. 467, 480, 99 N. E. 289, Ann. Cas. 1913D, 715. The monopoly it seeks to establish may not be complete but it has gone far enough to eliminate any effective rivalry. The restriction is not confined to the sale or transfer to a business rival of the plaintiff, but the merchant or collector cannot dispose of book or stamps to any one even if their retention unused must result in pecuniary loss. Indeed this is an essential and controlling feature of the contract, which differs materially from the contract in *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N. E. 761. While we do not go so far as to say that trading stamps are an absolute public necessity, yet they enter into the merchant's business, and are an essential element of a form of bargain and sale which a very appreciable portion of the public demands.

Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479. The direct and intended effect of the methods employed being to restrain or prevent the pursuit by the defendants or of others of a similar enterprise in a lawful manner, the plaintiff is within the prohibition of the St. of 1908, c. 454, § 1, which declares that such an arrangement or agreement, whatever form it may assume, or however carefully the constituent parts may be assembled is "against public policy and illegal and void." The exceptions to the report not having been argued need not be considered, and the master having found that they have not as to the plaintiff's customers used or propose to use any information obtained from it while the defendant Murphy was in its employment, the defendants are not shown to have violated any enforceable rights of the plaintiff. St. 1908, c. 454, § 2; *White v. Buss*, 3 Cush. 448; *Gibney v. Olivette*, 196 Mass. 294, 295, 82 N. E. 41; *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11. The decree dismissing the bill is therefore affirmed with costs.

Ordered accordingly.

SPERRY & HUTCHINSON CO. v. FENSTER.

(District Court of the United States, 1915. 219 Fed. 755.)

CHATFIELD, District Judge. The plaintiff seeks a preliminary injunction against several defendants, one of whom is in default, one appears in person, and the others are represented by attorney. The latter raises objections which go substantially to the issuance of any injunction upon the bill and petition, so that the matter will be considered in its entirety.

The papers show the usual condition presented in similar suits in which the defendants have obtained S. & H. Green Trading stamps, under conditions equivalent to a purchase from the subscribers for these stamps, and are giving them to their own customers, and advertising so to do, as an inducement for trading.

It has been previously held, in a number of cases, that the plaintiff can restrict the giving of Green trading stamps, as a present or premium to customers, to the so-called "subscribers" who obtain under contract the right to give out these coupons (exchangeable for various premiums) by paying a consideration therefor and by agreeing to distribute the stamps only to customers. In other words, the subscriber contracts not to assign or transfer the advertising benefits which he expects to obtain from his purchase of stamps to be given to his customers who thus acquire the privilege of selecting a premium by holding evidence of having traded with that particular dealer to a certain amount.

The defendants contend that the plaintiff's practice of seeking to enjoin (and even in certain state jurisdictions to punish by prosecution) dealers who are using such trading stamps as an inducement to their customers to transact business, without having subscribed for the right so to do, and without having obtained the stamps by payment therefor to the company issuing the stamps, is contrary to the present decisions of the United States Supreme Court and to the provisions of the laws forbidding monopoly.

The last statute upon this subject, known as the Clayton Law, and approved by the President upon the 15th day of October, 1914, provides in section 3 against the making of a contract or fixing of a price for merchandise on condition that the lessee or purchaser shall not use, or deal in, the merchandise of a competitor, if the effect of this contract would be to substantially lessen competition or tend to create monopoly. This statute forbids the converse of the acts complained of in the present action, and we have nothing to do with what might happen if the Green trading stamp people were seeking to forbid the use by its subscribers of any other kind of trading stamps. This might or might not be a restriction upon competition or tend to effect a monopoly.

Nor does the case of *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, control the present application. If the Sperry & Hutchinson Company refused to redeem their coupons solely upon the ground that the coupons had been transferred after purchase from a subscriber, the *Bauer Case*, *supra*, would necessitate the ruling that such refusal to redeem would be justified only in case the party seeking to redeem had induced or knowingly assisted in some breach of contract.

The case of *Bobbs-Merrill Co. v. Straus et al.*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, cited by the defendants, and the case of *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, decide that the vendor of goods which had been once sold at a price giving to that vendor all the profit which it could ask could not then restrict the further sale, at a loss, to the party making the resale.

Inasmuch as it was held that the rules of business competition did not require and would not allow the prohibition of transfer of articles in a way which would not affect the rights of the original vendor, the contracts seeking to prevent the subsequent sales were held to be in restraint of trade, contrary to the Sherman Law and the principles of common law.

But the sale of trading stamps is much more like the transactions considered in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, in that the reason for insisting upon a contract is to restrict the sharing in a certain legitimate privilege, to those who pay for the privilege, and to prevent, by a mere transfer of the trading stamps, the bestowal of the advantage of giving out the stamps, and of getting trade thereby, upon any person who might by holding the stamps be entitled to claim the rights of redemption.

It is evident that the intent and acts of persons taking the stamps and seeking to redeem them for a certain premium, and also the resultant benefits to that person, are entirely different and are based upon substantially different rights from those of a party who is seeking to attract customers and to build up his own trade through the privilege of dealing, as it were, in trading stamps, without payment for that privilege and with no intention of getting the goods for which the stamps are redeemable.

The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable without compensation to the person granting that right, viz., the plaintiff herein.

This is exactly the distinction which seems to have been had in mind by Judge Thomas of this court in the case of *Sperry & Hutchinson Co. v. Benjamin Benjamin et al.*, 221 Fed. 512 (March 27, 1905), and it is unnecessary to postpone the determination of this question as now raised until final hearing, for the reason that the defendants do not plead ignorance of the existence of some contract under which the

trading stamps were issued; nor are they merely claiming to be innocent holders of particular stamps for which they have given a valid consideration. They are, on the contrary, insisting upon their right to knowingly and deliberately purchase from the licensee the benefits granted for a limited use and which they know could only be obtained by themselves by paying for one of the contracts above referred to.

The distinction suggested by the defendants, that they have not sought to induce anybody to break the contract, but that they have purchased these stamps in the open market, is no defense, in the face of actual notice to them that the stamps are not and could not be obtained from the Sperry & Hutchinson Company, except by some one who had entered into a subscription and paid for the privilege of obtaining them.

Temporary injunctions will issue.

FEDERAL TRADE COMMISSION v. GRATZ. ✓

(Supreme Court of the United States, 1920. 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993.)

Proceeding by Anderson Gratz and another, doing business as Warren, Jones & Gratz, and others, against the Federal Trade Commission, to set aside an order of the Commission. The order was annulled by the Circuit Court of Appeals for the Second Circuit (258 Fed. 314, 169 C. C. A. 330), and the Commission brings certiorari.

Mr. Justice McREYNOLDS delivered the opinion of the Court.⁹

Undertaking to proceed under section 5 [of the Federal Trade Commission Act of June 4, 1917], the commission issued a complaint containing two counts against respondents. The first related to unfair methods of competition, and the second charged violation of section 3 of the Clayton Act, approved October 15, 1914 (chapter 323, 38 Stat. 730 [Comp. St. § 8835c]). Respondents denied both charges. After taking much testimony the commission held there was no evidence to support the second count; but it ruled that respondents had practiced unfair competition and ordered that they, "their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind."¹⁰

It is unnecessary now to discuss conflicting views concerning the validity and meaning of the act creating the commission and the effect of

⁹ Quotations from the Federal Trade Commission Act, which is printed in the appendix, are omitted.

¹⁰ A quotation from the opinion below and the complaint are omitted.

the evidence presented. The judgment below must be affirmed, since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the fair intendment of those words. We go no further and confine this opinion to the point specified.

When proceeding under section 5 it is essential, first, that, having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding "in respect thereof would be to the interest of the public"; next, that it formulate and serve a complaint stating the charges "in that respect," and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If after a hearing the commission shall deem "the method of competition in question is prohibited by this act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.

The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

Count 1 alleges, in effect: That Warren, Jones & Gratz are engaged in selling, either directly to the trade or through their correspondents, cotton ties produced by the Carnegie Steel Company and also jute bagging manufactured by the American Manufacturing Company. That P. P. Williams & Co., of Vicksburg, and C. O. Elmer, of New Orleans, are the selling and distributing agents of Warren, Jones & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers, who resell them to retailers, ginners, and farmers. That with the purpose and effect of discouraging and stifling competition in the sale of such bagging all the respondents for more than a year have refused to sell any of such ties unless the purchaser would buy from them a corresponding amount of bagging—six yards with as many ties.

The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually

do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *United States v. Colgate*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992; *United States v. A. Schrader's Son, Inc.* (March 1, 1920), 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471.

The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident.

The judgment of the court below is

Affirmed.

Mr. Justice PITNEY concurs in the result.

Mr. Justice BRANDEIS dissenting, with whom Mr. Justice CLARKE concurs.¹¹

The complaint here under consideration stated clearly that an unfair method of competition had been used by respondents, and specified what it was, namely, refusing to sell cotton ties unless the customer would purchase with each six ties also six yards of bagging. The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the act to regulate commerce imposes (Comp. St. § 8565). It is unnecessary to set forth why the rate specified was unjust or why the preference specified is undue or unreasonable, because these are matters not of law but of fact to be established by the evidence. *Pennsylvania Co. v. United States*, 236 U. S. 351, 361, 35 Sup. Ct. 370, 59 L. Ed. 616. * * *

In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to sub-

¹¹ Of the four parts of this opinion, all of the first and fourth and part of the second are omitted.

jecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. And what it is brought to prevent is not the commission of acts of unfair competition, but the pursuit of unfair methods. Furthermore, the order is not self-executory. Standing alone it is only informative and advisory. The commission cannot enforce it. If not acquiesced in by the respondents, the commission may apply to the Circuit Court of Appeals to enforce it. But the commission need not take such action, and it did not do so in respect to the order here in question. Respondents may, if they see fit, become the actors and ask to have the order set aside. That is what was done in the case at bar.

The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade, and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some of the states as early as 1889. In 1890 Congress passed the Sherman Law (Comp. St. §§ 8820-8823, 8827-8830). It was followed by much legislation in the states and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry, and the farm implement industry.

A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this court rendered its decision in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and in *American Tobacco Co. v. United States*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies,

and particularly through regulating competition. The latter view prevailed in the Sixty-Third Congress. The Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act (Act Sept. 26, 1914, c. 311, 38 Stat. 717) created an administrative tribunal, largely with a view to regulating competition.

Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by section 5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices. As Standard Oil rebates led to the creation of the Interstate Commerce Commission, other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that, as the former had substantially eliminated rebates, the latter might put an end to all other unfair trade practices, and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines; and the machinery employed was substantially similar.

In undertaking to regulate competition through the Trade Commission, Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade:

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the commission. The potency of accomplished facts had already been demonstrated. The task of the commission was to protect competitive business from further inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act. And it should do this by filing a complaint with a view to a thorough investigation, and, if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.

(2) Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrass-

ing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of century earlier, when by the act to regulate commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage. See *Pennsylvania Co. v. United States*, supra, 236 U. S. 361, 35 Sup. Ct. 370, 59 L. Ed. 616; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the commission the duty of finding the facts, and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court. Compare *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

Third. Such a question of law is presented to us for decision, and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer, except upon condition that the purchaser will buy from him also his trade requirements in another article or articles, reasonably be found by the commission to be an unfair method of competition under the circumstances set forth in the findings of fact? If we were called upon to consider the sufficiency of the complaint, and that merely, the question for our decision would be, whether the particular practice could, under any circumstances, reasonably be deemed an unfair method of competition. But as this suit to set aside the order of the commission brings before us its findings of fact, we must determine whether these are sufficient to support their conclusion of law that the practice constituted "under the circumstances therein set forth, unfair methods of competition in interstate commerce against other manufacturers, dealers and distributors in the material known as sugar-bag cloth, and against manufacturers, dealers and distributors of

the bagging known as re woven bagging and second-hand bagging in violation of" the statute.

It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in co-operation. Similarly what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of resources. Without providing for those cases where the method of competition here involved would be unobjectionable, Massachusetts legislated against the practice, as early as 1901, by a statute (chapter 478) of general application. Its highest court, in applying the law which it held to be constitutional, described the prohibited method as "unfair competition." *Commonwealth v. Strauss*, 188 Mass. 229, 74 N. E. 308; *Id.*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842. Compare *People v. Duke*, 19 Misc. Rep. 292, 44 N. Y. Supp. 336. The (Federal) Bureau of Corporations held the practice, which it described as "full-line forcing" to be highly reprehensible.

Congress, by section 3 of the Clayton Act, specifically prohibited the practice in a limited field under certain circumstances. An injunction against the practice has been included in several decrees in favor of the government entered in cases under the Sherman Law. In the decree by which the American Tobacco Company was disintegrated pursuant to the mandate of this court, each of the fourteen companies was enjoined from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it. * * *" *United States v. American Tobacco Co.* (C. C.) 191 Fed. 371, 429. The practice here in question is merely one form of the so-called "tying clauses" or "conditional requirements" which have been declared in a discerning study of the whole subject to be "perhaps the most interesting of any of the methods of unfair competition."

The following facts found by the commission, and which the Circuit Court of Appeals held were supported by sufficient evidence, show that the conditions in the cotton tie and bagging trade were in 1918 such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition: Cotton, America's chief staple, is marketed in bales. To bale cotton, steel ties and jute bagging are essential. The Carnegie Steel Company,

a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton tie situation in the United States and is able to fix and control the price of such ties throughout the country. The American Manufacturing Company manufactures about 45 per cent. of all bagging used for cotton baling; one other company about 20 per cent.; and the remaining 35 per cent. is made up of second hand bagging and a material called sugar-bag cloth. Warren, Jones & Gratz, of St. Louis, are the Carnegie Company's sole agents for selling and distributing steel ties. They are also the American Manufacturing Company's sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Company, Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby it was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing states were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Company in order to procure a sufficient supply of steel ties.

These are conditions closely resembling those under which "full-line forcing," "exclusive-dealing requirements" or "shutting off materials, supplies or machines from competitors"—well-known methods of competition, have been held to be unfair, when practiced by concerns holding a preponderant position in the trade. * * *

In my opinion the judgment of the Circuit Court of Appeals should be reversed.

STANDARD FASHION CO. v. MAGRANE-HOUSTON CO.

(Supreme Court of the United States, 1922. 258 U. S. —, 42 Sup. Ct. 360, 66 L. Ed. —.)

Mr. Justice DAY delivered the opinion of the Court.

Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called standard patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals. 259 Fed. 793, 170 C. C. A. 593.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods

business at the corner of Washington street and Temple place in the city of Boston. On November 14, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of standard patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereafter provided. Petitioner agreed to sell to respondent standard patterns at a discount of 50 per cent. from retail prices, with advertising matter and publications upon terms stated, and to allow respondent to return discarded patterns semiannually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped from time to time thereafter. The contract provided that patterns returned for exchange must have been purchased from the respondent, and must be delivered in good order to the general office of the seller in New York. Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, \$1,000 value in standard patterns at net invoice price, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. Respondent agreed not to assign or transfer the agency, or to remove it from its original location, without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell standard patterns except at labeled prices. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of standard patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party 3 months' notice in writing within 30 days after the expiration of any contract period, the agency to continue during such 3 months. Upon expiration of such notice respondent agreed to promptly return to petitioner all standard patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths costs. Neglect to return the pattern stock within 2 weeks after the expiration of the 3 months' notice to relieve the petitioner from all obligation to redeem the same. It was further stipulated that in the event the business property of the respondent, or a substantial part thereof, should be disposed of by respondent for business other than that of dry goods or as a general department store, the respondent should have the privilege of terminating the contract by giving the petitioner due notice of such change. Two weeks after the change in the premises had been made the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.¹²

The principal question in the case, and the one upon which the writ

¹² A part of the opinion, relating to a secondary point, is omitted.

of certiorari was granted, involves the construction of section 3 of the Clayton Act, 38 Stat. 731 (Comp. St. § 8835c). That section, so far as pertinent here, provides:

"It shall be unlawful * * * to * * * make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company.

It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture; but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington street and Temple place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. *Straus et al. v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955.

The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act, because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly"?

The Clayton Act, as its title and the history of its enactment dis-

closes, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890 (Comp. St. §§ 8820-8823, 8827-8830). The latter act had been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. The construction since regarded as controlling was stated in the *Standard Oil Case*, 221 U. S. 1, 58, 31 Sup. Ct. 502, 515 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), wherein this court construed the act as intended to reach combinations unduly restrictive of the flow of commerce or unduly restrictive of competition. It was said that the act embraced "all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." See, also, *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States v. St. Louis Terminal Co.*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; *United States v. Union Pacific R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; *Nash v. United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Straus v. American Pub. Ass'n*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369.

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which "may substantially lessen competition or tend to create a monopoly."

Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent, without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports. See *Railroad Commission of Wisconsin et al. v. C., B.*

& Q. R. R. Co. (decided February 27, 1922) 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. —, and previous decisions of this court therein cited.

Section 3 condemns sales or agreements where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that of 52,000 so-called pattern agencies in the entire country, the petitioner, or its holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals, summarizing the matter, pertinently observed:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

PICTORIAL REVIEW CO. v. CURTIS PUB. CO.

(District Court of the United States, 1917. 255 Fed. 206.)

In Equity. Suit by the Pictorial Review Company against the Curtis Publishing Company. On plaintiff's motion for temporary injunction.

AUGUSTUS N. HAND, District Judge. The complainant corporation publishes the Pictorial Review, and the defendant the Ladies' Home Journal, the Saturday Evening Post, and the Country Gentleman.

The Pictorial Review has been distributed by the American News Company, a distributing agency, which has about 60 branches throughout the United States. The defendant, on the other hand, has put the Ladies' Home Journal on the market through wholesale dealers of established efficiency in the various towns and cities of the United States. Munsey seems to have distributed his publications to some degree as early as the year 1890 through local dealers, but the defendant in 1899 introduced an elaborate system for training newsboys to do expert work in selling magazines. It was evidently the opinion of the defendant that the circulation of its magazines would be greatly promoted if the newsboys selling the defendant's publications were organized, their mental and moral progress stimulated, and a legitimate ambition to excel in their work fostered. The affidavit of its circulation manager describes the system. It involves the appointment by the defendant of district agents, who select the boys and teach them to sell. These agents make a weekly detailed report to the defendant as to each boy. The boys form a "League of Curtis Salesmen," consisting only of schoolboys, and with various ranks. These ranks are determined by proved efficiency. Each league member is given a Y. M. C. A. membership paid for by the defendant, and the latter undertakes to secure a good position for each master salesman after he has finished school and outgrown the work. More than 2,000 firms and corporations appear to have filed applications with the defendant to secure these graduate master salesmen as employés.

Regular publications are issued monthly as a part of this system: (1) To the district agent; (2) to the boys; (3) to the parents and teachers of the boys. The defendant has spent a large amount of money in developing and maintaining this system. Sometimes the defendant has selected as its district agents wholesalers who had an existing staff of newsboys, but in such cases the boys have apparently become a real part of the "League of Curtis Salesmen," and have been required to conform to the system. More often the district agents and their staff of boys have been started and developed from the beginning through the labors of the defendant, and in many cases the district agents have been old Curtis boys, who have graduated from their earlier work, followed the same general kind of business, and become wholesale dealers for the Curtis Company. This system was used by the defendant to promote the sale of the Saturday Evening Post, and was so successful that it employed it with the Ladies' Home Journal.

It is evident that supervising district managers were necessary to carry out the plan I have described, and defendant in contracting with these managers has provided that they should pay for magazines furnished them in advance and should supply subagents, both boys and dealers, with copies of defendant's publications at fixed rates. It also has provided that the district agents shall refrain from wholesaling to boys or dealers, and from attempting to influence any Curtis

agent to sell any periodical other than those published by the Curtis Publishing Company, and shall refrain from furnishing any other publisher or his agent with the names and addresses of any Curtis agents without first obtaining the approval of the publishers. The clause in the contract with the district agents relating to the Curtis boys is subdivision 12, and is as follows: "To send to the home office, on blanks furnished by the publishers, not later than directed by the report blanks, reports itemizing the number of copies of each publication sold by each boy, dealer, or other subagent, or sold at retail by the district agent or his employés, and to distribute rebate vouchers regularly to subagents, according to instructions from the publishers: Provided that rebate vouchers shall be given to subagents only, and are not redeemable by the district agent nor by his relative or salaried employés."

The district agents may sell any magazines they desire, including the complainant's, at their own news-stands, but their contracts forbid them to furnish boys or retail dealers with magazines other than those of the defendant, without first obtaining the defendant's approval. Such approval has been in general granted, but has been refused in the case of the Pictorial Review. That magazine is the active competitor of the Ladies' Home Journal. Each has a large sale throughout the country, and is of special interest to women. The marked success of defendant's system of marketing its magazines has attracted the complainant, and the latter desires to avail itself of defendant's wholesale agents, without the expense which is involved in building up such a system as the defendant has employed. It argues that the defendant cannot insist that its wholesalers shall not market the Pictorial Review without violating the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730), for the reason that a contract that the district agents shall not deal in the Pictorial Review through newsboys or subdealers substantially lessens competition, and is forbidden by section 3 of that act (Comp. St. § 8835c).¹³

I can have no doubt that the district agents or wholesalers who receive from the defendant the Ladies' Home Journal and put it on the market are purchasers of the magazine. There can be no question, in view of the payment in advance and the other elements of the transaction, that title to the magazines which these wholesale agents receive passes to them. They are not mere factors or agents. Nevertheless they are clearly much more than purchasers. The prime characteristic of the Curtis system is to market the defendant's magazines through newsboys, and to develop an efficient body of these boys by a proper selection in the first place, by keeping them in good surroundings, by appealing to their ambition through conferring ranks and prizes in case of success, and by obtaining good business positions

¹³ This section, here quoted, will be found in the Appendix.

for those who have retired. There is no doubt that by means of this system the sale of the defendant's magazines is greatly increased.

If nothing but a sale were involved, I might support complainant's contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictorial Review through sub-dealers and boys; but what complainant evidently desires is, not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade, but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor, and capital of the defendant. The defendant, in insisting upon maintaining the integrity of its system, is not in my opinion guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant.

If I thought that the system of marketing defendant's magazines was a cover to avoid the provisions of the Clayton Act, or obtain a monopoly, I might reach a very different conclusion, but I am satisfied that the system is genuine, and not in any respect other than what it represents itself to be. It may not be entirely original, but I think it is doubtless due very largely to the constructive business ability of the defendant in devising an ingenious means of marketing its magazine. The principal reason, doubtless, for selling the magazines to the district agents, rather than making consignments, with consequent financial risks, is one of safety and simplicity, and is not sufficient, in my opinion, to subject the relations of the parties in all respects to those of mere vendor and vendee.

Judge Hough, in the case of *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (D. C.) 224 Fed. 566, held that the refusal of the manufacturers of Cream of Wheat to sell to a dealer who resells at retail at less than the regular price did not entitle the dealer to an injunction to restrain such conduct on the part of the manufacturer, and added that the substantial restraint of competition denounced by the Clayton Act is an unreasonable restraint. He placed his decision largely on the ground that defendant had a lawful monopoly in Cream of Wheat, because there could be nothing lawfully called "Cream of Wheat" without defendant's consent and approbation. It may in the same way be said in this case that the defendant has a lawful right to employ the means of selling its product exclusively through the League of Curtis Salesmen. It is not the monopoly of a patented ar-

ticle or of a trade-name, but so long as the defendant is maintaining the above agency for selling its product, just so long, I think, it has a right which the law will recognize to refuse to have its magazines sold by the boys, if they are to handle at the same time a competing magazine of the complainant. The fact that they are a better trained set of boys, with a larger measure of experience, and perhaps also of good will in the community, than any which the complainant is likely readily to secure, is immaterial.

Any restraint of competition which may take place is due to no other cause than the employment by defendant of selling agents who contract not to distribute the Pictorial Review through subagents or boys who are engaged in selling the Ladies' Home Journal. In some towns there may be no existing agent as efficient as the one employed by the defendant, but that fact may in many cases be due to the thorough prosecution of the plan of organizing newsboys and selling magazines through them which the Curtis Publishing Company has developed. In these localities complainant can doubtless obtain equally good selling agencies by the expenditure of a similar amount of effort. Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established, with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act.

The motion for a temporary injunction must be denied.¹⁴

SINCLAIR REFINING CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1921. 276 Fed. 686.)

Before BAKER, EVAN A. EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is an original petition against Federal Trade Commission, hereafter called respondent, to review an order made in a proceeding wherein it had filed its complaint against Sinclair Refining Company, hereinafter called petitioner, the substance of which complaint was that petitioner, being engaged in the business of purchasing and selling oil and gasoline and the leasing and loaning of oil pumps, storage tanks, or containers and their equipment, leased,

¹⁴ See, also, *Curtis Publishing Co. v. Federal Trade Commission* (C. C. A.) 270 Fed. 881 (1921), in which case a writ of certiorari was granted by the Supreme Court. 256 U. S. 688, 41 Sup. Ct. 625, 65 L. Ed. 1172 (1921).

for a nominal consideration, said oil pumps, storage tanks, or containers and their equipment to persons who purchased oil from petitioner, with the understanding that the same should not be used by the lessees of the pumps and other equipment to hold or pump the oil of any competitor. It was also charged that the leases were made on consideration that lessees should not purchase or deal in the products of a competitor.

In answer to that complaint, petitioner set out the contract, which was found by the Federal Trade Commission to be the uniform contract by which such equipment was leased, the portions of which material here are:

"1. The above-described equipment shall be used by party of the second part [purchaser of gasoline] for the sole purpose of storing and handling the gasoline supplied by party of the first part: * * *

"6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of ——— months from the date hereof, * * * provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of \$———."

After the findings of fact were made, the order to cease and desist, here complained of, was entered.

The question, plainly stated, is: Does the leasing, under the terms of the contract in evidence, at a nominal charge, of containers and pumps by petitioner to purchasers of its gasoline constitute an "unfair method of competition," as those words are used in section 5 of the Federal Trade Commission Act of September 26, 1914 (Comp. St. § 8836), or may the effect of such leasing be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products in violation of section 3 of the Clayton Act (Comp. St. § 8835b)?

This identical matter was recently decided by the Court of Appeals in the Second Circuit in *Texas Co. v. Federal Trade Commission*, and *Standard Oil Co. of New York v. Federal Trade Commission*, 273 Fed. 478, adversely to the respondent's contention here.

1. "Unfair methods of competition" have been discussed by this court in the opinion in *Kinney-Rome Co. v. Federal Trade Commission*, 275 Fed. 665, just filed.

Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise they do not, in our opinion, as we said in the *Kinney-Rome Case*, *supra*, amount to an unfair method of competition.

In addition to the reasons upon which the decision was based in the *Texas Company Case*, *supra*, we are of opinion that petitioner had the undoubted right to furnish any and every purchaser such con-

tainers and conveniences to aid him in delivering the gasoline into the possession of the consumer as it might see fit, and at such cost as it might see fit. The right to fix prices is not given to the Federal Trade Commission. The only cases where the question of price has come into consideration have been those wherein the making of a price—in some cases high, in others low—has been used as an element in some fraudulent scheme of oppression. The price which one may put upon that which he has to sell or lease is a matter wholly his own. *United States v. Freight Ass'n*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Sears, Roebuck & Co. v. Federal Trade Com.*, 258 Fed. 307, 312, 169 C. C. A. 323, 6 A. L. R. 358.

Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said: "Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise, you may and must buy them."

In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different nor unfair. If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what is too fast a pace for some and to compel others to slow up; in other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practices from business in interstate commerce.

2. We are of opinion that there was no violation of section 3 of the Clayton Act. The complaint under that section is that petitioner made leases for the container and pump and fixed the price therefor "on the condition, understanding, and agreement that the lessees thereof shall not purchase or deal in the products of a competitor or

competitors, of respondent" (petitioner). There is nothing in the evidence nor in the findings of fact by the Federal Trade Commission that supports any such charge. The finding is that there was a uniform contract. There is no word there about purchasing from competitors. The only limitation is that "the above-described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part."

But there are other findings, that, taken in connection with the order to cease and desist, very clearly indicate what the Commission deemed the real trouble which it desired to reach was, viz.: "That the monetary considerations received by respondent [petitioner] do not represent reasonable returns upon the investment in such devices and equipment, and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same." And again: "That only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does, as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition," etc.

There are two paragraphs of the order to cease and desist, and they are substantially as follows: The substance of the first is that petitioner shall not lease the equipment in question at a rental which will not yield to it a reasonable profit, and the substance of the second is that petitioner shall not enter into or continue to operate under contracts whereby dealers agree that, in consideration for the leasing to them of such equipment, the same shall be used only for storage or handling the product of petitioner.

The necessary conclusion from the above findings and the orders entered is: First, that the Commission deemed it lawful and proper for it to condemn certain rentals and also to fix and regulate the rentals on the equipment, because the furnishing of such equipment required a large capital investment and because many competitors of respondents were financially unable to do that same sort of thing. As we have hereinbefore said, Congress did not bestow upon respondent any power to regulate or fix prices (*Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 312, 169 C. C. A. 323, 6 A. L. R. 358); nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of another competitor; nor do we find anything that authorizes respondent to regulate competition for that reason. Section 3 does not make

it unlawful to make sales or leases, but does make it unlawful to make sales or leases on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, etc., of a competitor where the effect of such lease, condition, agreement, or understanding may be to substantially lessen competition, etc. The above provisions of section 3 were the substance of the unproven charge in respondent's complaint against petitioner, referred to above. It is perfectly clear that that which the Commission found was "the uniform contract used by respondent for leasing such devices" contained no provision comparable with or equivalent to the thing prohibited in section 3. We are of opinion that there is nothing in the section that could be construed as preventing petitioner, under the circumstances shown in this case, from putting a limitation upon the use of the thing leased. It has long been a practice in real estate leases to include limitations upon the use of the property, and the reasons for doing so are obvious. Such has likewise been the practice in the leasing or hiring of personal property. The reasons for such limitations are even more obvious than those for the placing of them in real estate leases. Some of the reasons are pointed out in the opinion in the Texas Company Case, *supra*.

3. In this case, as in the Fruit Growers' Express Case, 274 Fed. 205, decided by this court, opinion filed June 16, 1921, if an order to cease and desist is to stand, the effect of the action of the Federal Trade Commission seems to have been to terminate and destroy the contractual rights of persons not parties to the proceeding.

The order to cease and desist is annulled and set aside.¹⁵

AUTO ACETYLENE LIGHT CO. v. PREST-O-LITE CO.

(Circuit Court of Appeals of the United States, 1921. 276 Fed. 537.)

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. The Prest-O-Lite Company has for many years been engaged in generating, storing, and distributing acetylene gas for use in automobile lighting and in welding. Its gas is stored in portable steel cylinders lined with asbestos or other porous material, which absorbs a quantity of acetone, which, in turn, is saturated with acetylene gas introduced under pressure; the outflow for consumption being valve-controlled. The entire package, so filled, is furnished the consumer in the first instance. When the gas is consumed, the tank is, under complainant's system, accepted at any one of a large number of agencies throughout the United States in exchange for a package fully charged by plaintiff. Its right to protection against unfair competition has been recognized and enforced in a long series of litigation relating to cylinders for automobile lighting.

¹⁵ A writ of certiorari in this case was granted by the Supreme Court, 257 U. S. —, 42 Sup. Ct. 183, 66 L. Ed. — (1922).

In 1913 plaintiff extended its service to the welding trade, and has a large number of customers, to whom it is supplying this service under a system generally similar to that relating to automobile lighting, but differing therefrom in the fact that its welding tanks are supplied (to its customers) under contracts which treat the tanks as held by the consumer as containers merely of plaintiff's gas, and on rental only; each tank bearing on the outer surface permanent legends, including the serial number of the cylinder, the date of manufacture, its weight, and the fact that it is plaintiff's property, together with the statement that the acetylene is prepared and pressed into porous substance by the plaintiff, the latter's compliance with certain governmental specifications, and that, when empty, it is to be redelivered to plaintiff. The defendant Auto Acetylene Light Company is engaged at Toledo, Ohio, in manufacturing and selling acetylene gas in tanks of the same general nature as those of complainant and in refilling the same. The defendant Young is the general manager of the corporate defendant.

The bill of complaint alleges defendant's knowledge of plaintiff's rights, including its contracts and exchange service, and charges that defendants are inducing, procuring, and assisting plaintiff's customers to violate their contracts with plaintiff, by refilling plaintiff's tanks with defendants' acetylene gas, to plaintiff's injury, as specifically set forth in the bill. An injunction was prayed against such interference with plaintiff's rights. Hearing was had upon affidavits presented by both parties, and preliminary injunctions allowed. Defendants answered, denying the jurisdiction of the court,¹⁶ as well as plaintiff's right to relief upon the merits, alleging especially, in substance, that plaintiff's contracts with its consumers amounted really to sales, that such consumers believed that they were thereby purchasing the tanks, and that the contracts violate the Clayton Act. The corporate defendant also asked that plaintiff be enjoined from representing to its customers that plaintiff is the owner of the tanks, and from seeking to prevent such consumers from having their tanks refilled by defendant.

In overruling a motion for rehearing of the application for preliminary injunction, upon which numerous affidavits were filed by each party, the court suggested that final submission be stipulated, "if there is nothing more of fact to be advanced." Counsel accordingly stipulated for such submission "upon the pleadings and affidavits heretofore filed and the record herein." The final decree, which is the subject of this appeal, was thereupon entered, enjoining defendants from interfering with plaintiff's system of exchange, causing such welding service contracts to be violated, procuring the delivery of plaintiff's exhausted tanks to any one other than plaintiff for refilling or otherwise, from receiving or refilling such tanks or damaging the same, and from dealing in or exchanging plaintiff's welding tanks. * * *

¹⁶ So much of the case as relates to this point is omitted.

Does plaintiff own the tanks? Its written agreements with consumers in plain terms declare that the tanks are not sold, but remain plaintiff's property. They recite that plaintiff is engaged in manufacturing and distributing Prest-O-Lite gas, consisting of dissolved acetylene compressed and stored in uniform steel cylinders, to be used for welding and other purposes; that after a certain use the acetylene becomes exhausted, and that other changes from wear and tear occur, making it impracticable and unsafe for others than the original manufacturer to refill the tanks; that it is necessary that plaintiff hold tanks in reserve while the empty cylinders are being retested, repaired, and refilled, in order to obtain continuous and uninterrupted service. There is express declaration that for the reasons recited it is intended that the title to the cylinders should remain in plaintiff; that in consideration of the consumer's payment as rental of \$25 or \$50 (dependent on the size of tank), plus an exchange fee later mentioned, plaintiff shall deliver to the consumer at any of its branches or operating plants east of the state of Colorado a given number of tanks of a described style filled with acetylene gas, and shall hold at the consumer's disposal (or that of the holder of the cylinders) reserve tanks necessary to make immediate exchanges.

It is provided (1) that the tank shall be redelivered to plaintiff whenever it becomes exhausted of gas, plaintiff thereupon immediately delivering to the consumer (or to the holder of the redelivered cylinder), not the same tank, but a standard tank of similar size and style, regardless of the condition in which the surrendered tank might be at that time through ordinary wear and tear, unavoidable accident, or act of God; (2) that in such exchange no payments shall be made plaintiff at greater rate than the lowest current price charged by it for exchanges in similar quantity in the locality where the tank issued shall be used, such exchange price being based on the number of cubic feet of acetylene gas contained in the tank; (3) that, if plaintiff unreasonably refuses to issue its tanks as agreed, it shall pay the consumer (or his assignees) an amount equal to the sum paid upon the original issue of the tank, less 5 per cent. for each year the agreement shall have run, but in no case less than 50 per cent. of the original payment; (4) the customer is given authority, through transfer of the tank, to assign all his rights therein.

There is convincing evidence that defendants were actively assisting and encouraging consumers to violate their contracts with plaintiff in having Prest-O-Lite tanks filled by defendants, instead of returning them to plaintiff for that purpose, and with knowledge that they are stamped as plaintiff's property. This is plainly an invasion of plaintiff's rights, unless its contracts with its customers amounted to sales of the tanks, or are void, because unconscionable when made, or for violation of the Clayton Act. We think the contracts under which the tanks were issued are plainly incapable of an interpretation as

intended to pass plaintiff's title to the tanks, and that consumers would not be justified in thinking otherwise.¹⁷

The important question is whether the contract between plaintiff and its customers violates section 3 of the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730; U. S. C. S. § 8835c), which, so far as important here, makes it unlawful to lease "goods, wares, merchandise, machinery, supplies, or other commodities" on the condition, agreement, or understanding that the lessee shall not use the supplies of a competitor of the lessor, where the effect of such lease or condition, agreement, or understanding may be "to substantially lessen competition or tend to create a monopoly." If the transaction were an absolute sale of the tank, any restriction whatever upon its use would be void, independently of the Clayton Act. *Motion Pictures Patents Co. v. Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; *Ford Motor Co. v. Union Motor Sales Co.* (C. C. A. 6) 244 Fed. 156, 156 C. C. A. 584. The contract in substance forbids the customer to use in the tank any acetylene gas except that manufactured and packed by plaintiff.

In considering whether the Clayton Act is violated, two questions suggest themselves: First, whether the contract effects a lease of a tank; and, second, whether the refilling of the tanks with gas amounts to using or dealing in "supplies" within the meaning of the act. These two questions are closely interrelated. In our opinion, both must be answered in the negative. Plainly no given tank is leased. Under the contract any tank, of one class or the other, is in the first instance delivered to the customer. This tank is to be returned when empty. The same tank is not then returned to the customer (and may never be), but another tank of the same class is returned, refilled, and so on to the end of the service. The customer has no interest in any particular tank, except while filled and in his possession, and then only because it is the container of the gas, which cannot otherwise be stored and delivered to the customer. The plaintiff holds at the disposal of its customers, in the course of the exchange service, its entire stock of reserve tanks.

The typical case of supplies, as in the *Mimeograph Case* (*Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880), is not presented. The dominant characteristic of the contract is the furnishing of acetylene gas. It is more proper to say that the delivery of the storage tank as a package or container is merely incidental to the furnishing of the gas than that the former is the subject of a lease and the latter a supply for a leased package. Acetylene gas cannot be bought, sold, or delivered in the market in the way that ordinary merchandise and "supplies" are sold and delivered. Practical-

¹⁷ It is then held that the plaintiff's contracts are not unconscionable.

ly and commercially it can be delivered only by filling the package with gas compressed therein, a circumstance which differentiates it from supplies as the term is ordinarily used. The case presented is *sui generis*, and no case on all fours with it has been found.

Nor are we impressed that the contracts in question substantially or unreasonably lessen competition or tend to create a monopoly. Not only is there no suggestion of agreement between competing companies, through division of trade or regarding price; but the record shows a highly active competition between plaintiff and defendants, no stifling of which can be suggested, unless in the bare fact that the customer under contract with plaintiff is more apt, other things being equal, to obtain its gas from plaintiff than from a competitor. The case presents some, although not a perfect, analogy to the so-called pump and tank cases, where it is held that a requirement that dealers distribute only the loaner's gasoline from leased devices is not an unfair method of competition, nor does it substantially lessen competition. Some measure of support for our conclusion is found, also, in *Curtis Publishing Co. v. Federal Trade Commission* (C. C. A. 3) 270 Fed. 881.

In our opinion the instant case is not brought within either the letter or the spirit of the Clayton Act.

The decree of the District Court is accordingly affirmed.

UNITED SHOE MACHINERY CORPORATION v. UNITED STATES.

(Supreme Court of the United States, 1922. 258 U. S. —, 42 Sup. Ct. 363, 66 L. Ed. —.)

Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by the United States against the defendants, United Shoe Machinery Company (of Maine), United Shoe Machinery Corporation, United Shoe Machinery Company (of New Jersey), and the officers and directors of these corporations, under the provisions of Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 731, 736, to enjoin them from making leases containing certain clauses, terms and conditions alleged to be violative of the act. Issues were made up, testimony taken, and a decree granted by the District Court enjoining the use of certain clauses in the leases. 264 Fed. 138. From that decree the present appeal was prosecuted to this court.

The record embraces 27 volumes of printed matter and 4 volumes of exhibits. The summary of testimony compiled by the defendants contains more than 1,000 pages. Much of it has but little bearing on the real issues to be decided, and so much as was essential might well have been embraced within a much narrower compass than is contained in the voluminous record now before us.

Section 3 of the Clayton Act (Comp. St. § 8835c), so far as perti-

ment, makes it unlawful for persons engaged in interstate commerce in the course of such commerce to lease machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States, or to fix a price therefor, or to discount from, or rebate upon, such price, upon the condition, agreement, or understanding that the lessee thereof shall not use or deal in the machinery, supplies, or other commodities of the competitor or competitors of the lessor, where the effect of such lease, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly.

The trial judge states that he took the time necessary to read and examine this voluminous record, and from it in the course of his opinion he makes certain findings of fact. These findings are entitled to the presumption of correctness which is given to the conclusions of a chancellor reached upon consideration of conflicting evidence, and we may add that in this case the opinion gives evidence of careful and painstaking research.

Our own examination of the testimony gives little occasion to modify the findings of fact made by the District Court. The record discloses that the United Shoe Machinery Corporation, hereinafter called the United Company, controlled a very large portion of the business of supplying shoe machinery of the classes involved in this case. The court below found that it controlled more than 95 per cent. of such business in the United States. Whether this finding is precisely correct it is immaterial to inquire. It is evident from this record that the United Company occupies a dominant position in the production of such machinery and makes and supplies throughout the United States a very large percentage of such machinery used by manufacturers.

It may be conceded at the outset, and was so found in the court below, that the company did not act oppressively in the enforcement of the forfeiture clauses of the leases. It is established that it furnishes machines of excellent quality; that it renders valuable services in the installation of machines, instructions to operators, promptness in furnishing machines when desired by manufacturers, and is expeditious in making repairs and replacements when necessary so to do. The machines of the United Company are protected by patents granted prior to the passage of the Clayton Act, and the validity of none of them is called in question here.¹⁸

Turning to the decree, it will be found that the court enjoined the use of (1) the restricted use clause, which provides that the leased machinery shall not, nor shall any part thereof, be used upon shoes, etc., or portions thereof, upon which certain other operations have not been performed on other machines of the defendants; (2) the exclusive use clause, which provides that if the lessee fails to use exclusively ma-

¹⁸ The ruling on a question as to necessary parties is omitted.

chinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased; (3) the supplies clause, which provides that the lessee shall purchase supplies exclusively from the lessor; (4) the patent insole clause, which provides that the lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the defendants' machines; (5) the additional machinery clause, which provides that the lessee shall take all additional machinery for certain kinds of work from the lessor or lose his right to retain the machines which he has already leased; (6) the factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors; (7) the discriminatory royalty clause providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor.

The defendant's restrictive form of leases embraces the right of the lessor to cancel a lease for the breach of a provision in such lease, or in any other lease or license agreement between the lessor and the lessee. The lessor in such case is given the right, by notice in writing to the lessee, to terminate any and all leases or licenses then in force to use the machinery and this notwithstanding previous breaches or defaults may have been unnoticed, waived, or condoned by or on behalf of the lessor. The District Court held that the United Company had the right to cancel a lease for a violation of the terms of the particular lease, but could not, without violating the act reserve the right to cancel a lease because the lessee had violated the terms of some other lease. This part of the decree must be read in the light of the circumstances shown as to the necessity of procuring shoe machinery from the United Company, and the danger of a lessee losing his ability to continue business by a forfeiture incurred from the breach of a single covenant in one lease.

While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor, except at the risk of forfeiting the right to use the machines furnished by the United Company, which may be absolutely essential to the prosecution and success of his business.

This system of "tying" restrictions is quite as effective as express covenants could be, and practically compels the use of the machinery of the lessor, except upon risks which manufacturers will not willingly incur. It is true that the record discloses that in many instances these provisions were not enforced. In some cases they were. In frequent instances it was sufficient to call the attention of the lessee to the fact that they were contained in the lease to insure a compliance with their provisions. The power to enforce them is omnipresent, and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act.

It is contended that the decree in favor of the defendants affirmed in the former suit of the government under the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830), 247 U. S. 32, 38 Sup. Ct. 473, 62 L. Ed. 968, between the same parties is *res judicata* of the issues in the present case.¹⁹

In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of a matter in controversy in the second suit? To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy.

The Sherman Act suit had for its object the dissolution of the United Company, which had been formed by the union of other shoe machinery companies. It also attacked and sought to enjoin the use of the restrictive and tying clauses contained in the leases as being in themselves contracts in violation of the Sherman Act. The Sherman Act and the Clayton Act provide different tests of liability. This was determined in the recent case of *Standard Fashion Co. v. Magrane Houston Co.* (decided April 10, 1922) 258 U. S. —, 42 Sup. Ct. 360, 66 L. Ed. —. In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule. Under the Sherman Act, as interpreted by this court before the passage of the Clayton Act, contracts were prohibited which unduly restrained the natural flow of interstate commerce, or which materially interrupt the free exercise of competition in the channels of interstate trade. In the second section monopolization or attempts to monopolize interstate trade were condemned. The Clayton Act (section 3) prohibits contracts of sale, or leases made upon the condition, agreement, or understanding that the purchaser or lessee shall not deal in or use the

¹⁹ A part of the discussion of this point is omitted.

goods of a competitor of the seller or lessor where the effect of such lease, sale, or contract, or such condition, agreement, or understanding "may" be to substantially lessen competition or tend to create monopoly. The cause of action is therefore not the same.

That the leases were attacked under the former bill as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents. The Clayton Act specifically applies to goods, wares, machinery, etc., whether "patented or unpatented." This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by letters patent from securing immunity from the inhibitions of the act. The determination of the questions now raised under the Clayton Act was not essential to the former decision. The defendants in their argument seize upon isolated passages in the opinion of the court in the former case, and contend that they are decisive here. But the effect of the former judgment as an estoppel is not to be thus determined. *Vicksburg v. Henson*, 231 U. S. 259, 269, 34 Sup. Ct. 95, 58 L. Ed. 209, and cases therein cited. In the Sherman Act case the issues were clearly stated in the prevailing opinion of this court:

"The charge of the bill is that the defendants, not being satisfied with the monopoly of their patents and determined to extend it, conceived the idea of acquiring the ownership or control of all concerns engaged in the manufacture of all kinds of shoe machinery. This purpose was achieved, it is charged, and a monopoly acquired, and commerce, interstate and foreign, restrained by the union of competing companies and the acquisition of others. And that leases were exacted which completed and assured the control and monopoly thus acquired. * * *

"There are two accusations against the defendants. One is that at the very outset they combined competing companies and subsequently acquired others, section 1 of the act of 1890 being thereby offended. The other is a monopolization of the trade in violation of section 2 of that act. And it is charged, as we have said, that certain leases and license agreements are the instruments which consummate both offenses."

After disposing of the charge adversely to the government's contention that the union of the pre-existing companies, constituting the United Company, was a combination in restraint of trade, the court passed to a consideration of the leases and said:

"There was complaint of them and the government attacks them. * * * To the attacks of the government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them, it is the monopoly of the right. * * * We must not overestimate the right or give it a sinister effect—permit it to be the means, to use the words of the government, 'to the building up and entrenchment' of an 'illegal monopoly.' * * *

"Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms which the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exercise within the field covered by the patent law is not an offense against the Anti-Trust Act. In other circumstances it may be, as in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, to which case that at bar has no resemblance.

"The question, then, is: Was the patent right lawfully exerted in the leases? Were they anything more than the exercise of the patent monopoly?"

This question the court proceeded to answer in the negative.

The issue whether the restrictive clauses were valid in view of the provision of the Clayton Act concerning machinery patented or unpatented was not and could not have been involved or decided in the former suit. It is true that the court speaks of the excellence and efficiency of the United Company's machinery as a sufficient inducement for its installation by the lessees, and we may add that there is much testimony in the record tending to show that it was the excellence of the United Company's machinery and the efficiency of its service which induced lessees to acquire its machinery; but these considerations are apart from the pertinent issues which here confront us. No matter how good the machines of the United Company may be, or how efficient its service, it is not at liberty to lease its machines upon conditions prohibited by a valid law of the United States. Congress has undertaken to deny the protection of patent rights to such covenants as come within the terms of the Clayton Act, and if the statute is constitutional, the sole duty of the court is to enforce it in accordance with its terms.

It is contended that the act is an unconstitutional limitation upon the rights secured to a patentee under the laws of the United States, and that it takes away from patentees without due process of law property secured to them by the grant of the patent. The solution of this contention depends upon the nature and extent of the rights secured under the grant of a patent.

From an early day it has been held by this court that the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee. *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532. This definition of the rights of the patentee has been the subject of frequent recent decisions of this court, and has been approved and applied in *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed.

871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447. The subject was given full consideration in *Motion Picture Co. v. Universal Film Co.*, supra, in which the former decision of this court, *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, holding that a mimeograph made under letters patent might be sold with a license agreement limiting its use to certain unpatented articles, was specifically overruled, and it was held that the patentee received from the law no more than the exclusive right to make, use and sell the invention.

Undoubtedly the patentee has the right to grant the use of the rights or privileges conferred by his patent to others by making licenses and agreements with them which are not in themselves unlawful, but the right to make regulation in the public interest under the police power of the states or in the exertion of the authority of Congress over matters within its constitutional power is controlled by general principles of law, and the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States. It was held by this court in *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, that the rights secured by a patent do not protect the making of contracts in restraint of trade, or those which tend to monopolize trade or commerce in violation of the Sherman Act. That principle was followed with approval when applied to rights secured under the copyright laws of the United States. *Straus v. Publishers' Association*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369. The same conclusion was reached in a well considered opinion in the Supreme Judicial Court of Massachusetts involving a state enactment. *Opinions of the Justices*, 193 Mass. 605, 81 N. E. 142. The same principle applies to the Clayton Act. The patent grant does not limit the right of Congress to enact legislation not interfering with the legitimate rights secured by the patent, but prohibiting in the public interest the making of agreements which may lessen competition and build up monopoly.

It is further insisted that the suit must fail because the parties were offered an alternative lease alleged to be free from the objectionable conditions complained of. But this lease was only granted upon the lessee making an initial payment in cash instead of paying the lessor royalties throughout the term. There is some conflict in the testimony as to whether the effect of such requirement was so onerous as to compel the lessee to choose the restricted form of leases. The issue involved here is whether leases with the restricted clauses in them, the enforcement of which has been enjoined by the District Court, were such as to make them violative of the provisions of the Clayton Act. The fact that a form of lease was offered which is not

the subject of controversy is not a justification of the use of clauses in other leases which we find to be violative of the act.

The defendants contend that the form of lease which they have adopted since the Clayton Act became effective is free from the restrictive and tying clauses, and is, therefore, unobjectionable, and hence no injunction should issue. These leases are terminable upon 30 days notice, and are denominated temporary loan agreements. They were evidently framed in view of the Clayton Act, and litigation likely to arise over the former leases in view of that enactment. The court below so found, and expressed the opinion that should the defendants' contention be sustained, and the conditions in controversy be held legitimate, leases containing them would again be insisted upon. The earnestness and zeal with which the right to use these clauses has been insisted upon throughout, confirms the conclusion of the trial judge. The fate of these substituted forms of leases evidently depends upon the outcome of this suit.²⁰

Other matters are urged, but we have noticed those deemed necessary to a decision of the case. We find no error in the decree of the court below, and the same is

Affirmed.

Mr. Justice McKenna dissents.

Mr. Justice Brandeis took no part in the consideration or decision of this case.

²⁰ So much of the opinion as considers whether interstate commerce was involved is omitted.

CHAPTER VIII.

UNFAIR PRICE PRACTICES

ELLIMAN, SONS & CO., Limited, v. CARRINGTON & SON, Limited.

(Chancery Division, 1901. 84 L. T. R. [N. S.] 858).¹

This was an action brought by Elliman, Sons & Co., Limited, manufacturers of embrocation, against the defendants C. Carrington & Son, Limited, Luke Crabtree (trading as W. Walker & Co.), and J. J. Thompson & Co. to restrain the alleged breach of a contract and for damages.

The plaintiffs sold the embrocation to wholesale dealers under a contract whereby the purchasers covenanted not to sell the goods for less than certain specified prices, and, if they sold to the trade, to procure a signed agreement to the same effect from every retailer to whom they sold the goods.

In September, 1898, the plaintiffs sold bottles of the embrocation to Luke Crabtree, trading as W. Walker & Co., and Crabtree signed the agreement. He sold the goods to J. J. Thompson & Co. without procuring a similar agreement, and Thompson & Co. sold the embrocation at lower than the stipulated prices.

In February, 1900, the plaintiffs sold some of the goods to C. Carrington & Son, Limited, and they sub sold to J. J. Thompson & Co. without procuring such agreement, and J. J. Thompson & Co. sold some of the goods at less than the prices specified.

KEKEWICH, J. The defendants' point is that this written contract into which they have entered must be treated as waste paper in a court of law, that is to say, that no action can be brought upon it. That result follows they say, from the fact or conclusion of law, which they allege, namely, that the contract is in restraint of trade. In one sense no doubt that is perfectly true because one of the contracting parties is not at liberty under the contract to do what he pleases with the goods which he purchases. But it is necessary to see what the contract really is. The plaintiffs are the manufacturers of Elliman's Royal Embrocation for horses and cattle and Elliman's Universal Embrocation for human beings. They are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do as they please, and when they have manufactured it, they are at liberty to sell it at whatever price they choose to fix, it may be a prohibitive one, or it may be such a small price that they cannot make any profit out of it.

¹ A somewhat more extended statement of facts appears in the report of this case in [1901] 2 Chan. Div. 275.

That is entirely for their consideration. There are no goods which the owner thereof may not lawfully retain or sell at such a price as he pleases. There is a good deal of ancient and interesting history about the storage of corn, but there is nothing in it which in a legal or moral sense can be applicable to Elliman's embrocation however useful it may be. Carrington & Son are minded to buy Elliman's embrocation with a view to selling it again, that is to say, to buy wholesale in order to sell to others retail, and Elliman, Sons & Co. make a bargain with them that they shall not sell it below certain prices—that part of the bargain has not been broken—and, that when they sell to others they will procure from those others an agreement that they will not sell it below certain prices. That part of the bargain has been broken.

Why should not Elliman, Sons & Co. be at liberty to fix the price in that way? Nobody had argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but it is just as much and more in restraint of trade for Elliman, Sons & Co. to say that they will not sell at all. It seems to me, to say the least, that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman, Sons & Co. The cases which have been cited are well-known authorities expounding a great principle and showing what exceptions there are to that principle. But this case seems to me not to fall within any principle of exception. I do not think it is touched by the authorities at all. It is merely a question whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy, but that phrase merely embodies for the present purpose the great principle of restraint of trade, and to say that it is to prevent Elliman, Sons & Co. from exercising their own discretion, seems to me to be applying a well settled principle of law to facts to which it cannot have any possible application. If that principle is to be applied to such a case, it must be applied elsewhere, but I cannot myself see that it has any application at all. On the question therefore, as to the validity of the contract, I am entirely against the defendants.

As to the form of the relief to be granted, I am of opinion, that the remedy by injunction is not necessary, because Elliman, Sons & Co. have the remedy in their own hands by refusing to supply their embrocation except upon their own terms. There must therefore be judgment for 20s. damages against the defendants Carrington & Son, and against the defendant Crabtree. As the defendants Thompson & Co. did not enter into any agreement with the plaintiffs, the action as against them must be dismissed.

DR. MILES MEDICAL CO. v. JOHN D. PARK & SONS CO.

(Supreme Court of the United States, 1911. 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502.)

Mr. Justice HUGHES, delivered the opinion of the court.²

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the state respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract, known as "Consignment Contract—Wholesale," has been made with over four hundred jobbers and wholesale dealers, and the other, described as "Retail Agency Contract," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted. *Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. 240; *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 Sup. Ct. 91, 12 A. & E. Ann. Cas. 693.

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the construction of the agreements, or, at least, of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents, and not its vendees. The court below did not so construe the agreement, and considered it an effort "to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid," and that under this agreement "the jobber must be regarded as the general owner, and engaged in selling for himself, and

² The statement of facts is omitted.

not as a mere agent of another." 90 C. C. A. 581, 164 Fed. p. 805.³

The other form of contract adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale, and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again; that is, retail dealers. It is agreed that they may purchase the medicines manufactured by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant, that is, if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicines to the defendant had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice Lurton (then circuit judge), in the opinion of the circuit court of appeals in the case of *John D. Park & Sons Co. v. Hartman*, 12 L. R. A. (N. S.) on page 147, 82 C. C. A. 158, 153 Fed. 24: "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for compe-

³ The part of the opinion, holding the "consignment contract" to result in a sale rather than an agency, is omitted.

tition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country," and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96; *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 92, 46 L. Ed. 1069, 22 Sup. Ct. 747; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. 307; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276.

But it is insisted that the restrictions are not invalid either at common law or under the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3200, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058, 22 Sup. Ct. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensee should sell. The court said, referring to the Act of July 2, 1890 (p. 92): "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale. As was said by Chief Justice Marshall in *Grant v. Ray-*

mond, 6 Pet. 241-243, 8 L. Ed. 384, 385: "It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. * * * The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. * * * The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered for a limited time."

The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute, and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Anyone may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its rights in the process by fraud or by breach of trust or contract. *Tabor v. Hoffman*, 118 N. Y. 36, 16 Am. St. Rep. 740, 23 N. E. 12; *Chadwick v. Covell*, 151 Mass. 190, 6 L. R. A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle v. Park*, 131 U. S. 88, 33 L. Ed. 67; 9 Sup. Ct. 658. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. 637.

Here, however, the question concerns not the process of manufacture, but the manufactured product—an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacturer and sale by the licensee to whom the communication is made. The complainant has retained its secret, which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains intact. That the complainant may rightfully object to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more

correct to say that they are manufactured according to the secret process, and do not constitute a communication of it.

It is also urged that, as the process is secret, no one else can manufacture the article. But this argument rests on monopoly of production, and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that if, for any reason, monopoly of production exists, it carries with it the right to control the entire trade of the produced article, and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by any one who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership, and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials, or efficiency. The fact that the market may not be supplied with the particular article unless he produces it is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question—whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy,

which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in 2 Coke on Littleton, § 360, 'be possessed * * * of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man.'" John D. Park & Sons Co. v. Hartman, 12 L. R. A. (N. S.) 146, 82 C. C. A. 158, 153 Fed. 24. See also Gray, Restraints on Alienation of Property, §§ 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production [citing and quoting *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722]. It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce not protected by any statutory grant is in any better case. See *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; *McGruther v. Pitcher*, [1904] 2 Ch. 306; *Garst v. Hall & L. Co.*, 179 Mass. 588, 55 L. R. A. 631, 61 N. E. 219. Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement.

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy [quoting from *Gibbs v. Consolidated Gas Co.*, 130 U. S. 409, 32 L. Ed. 984, 9 Sup. Ct. Rep. 553, and *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, (1894) A. C. p. 565, 6 Eng. Rul. Cas. 413].

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged,

manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer [citing cases].

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions

reviewed by Judge Lurton in delivering the opinion of the circuit court of appeals in *John D. Park & Sons Co. v. Hartman*, supra, and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right.

Judgment affirmed.

Mr. Justice LURTON took no part in the consideration and decision of this case.

Mr. Justice HOLMES, dissenting.

This is a bill to restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods; and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents, and not buyers; I understand to be conceded, and I do not see how it can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents, I do not understand its validity to be disputed. But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence, when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of *Saunders* if the construction of the contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing a breach of the ordinary duty of consignees as such (*Swift & Co. v. United States*, 196 U. S. 375, 395, 49 L. Ed. 518, 523, 25 Sup. Ct. 276), and therefore as entitling the plaintiff to relief (*Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. 240).

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722, or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers

is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price. This is the important question in this case. I suppose that in the case of a single object, such as a painting or a statue, the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack, if it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we

do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent, and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in nontransferable round-trip reduced-rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has been referred as a special circumstance in addition to the general grounds. *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 222-224, 52 L. Ed. 171, 182, 183, 28 Sup. Ct. 91, 12 A. & E. Ann. Cas. 693. The general and special considerations equally apply here, and we ought not to disregard them, unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case (*Jayne v. Loder*, 7 L. R. A. [N. S.] 984, 78 C. C. A. 653, 149 Fed. 21, 27, 9 A. & E. Ann. Cas. 294), and I think that my view prevails in England (*Elliman, Sons & Co. v. Carrington & Son*, [1901] 2 Ch. 275). See *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.

FISHER FLOURING MILLS CO. v. SWANSON.

(Supreme Court of Washington, 1913. 76 Wash. 649, 137 Pac. 144, 51 L. R. A. [N. S.] 522.)

ELLIS, J.⁴ In this action, the plaintiff seeks to enjoin the defendant from selling flour manufactured by the plaintiff at less than the retail price fixed by the plaintiff in a contract of sale made with the defendant, and to recover damages in the sum of \$1,000. The complainant alleges, in substance: That the plaintiff is a Washington corporation

⁴ This opinion has been shortened by the omission of extended citations and reviews of cases.

with its principal place of business at Seattle, where it has erected a large manufacturing plant and installed special machinery for manufacturing a special brand of flour known as "Fisher's Blend of Patent Flour." That the cost of manufacturing this flour is greater than that of ordinary flour. That the plaintiff has widely, and at great expense, advertised this flour as a blended flour, pure, wholesome, and of unusual excellence, and has used certain copyrighted designs and the above trade-name to acquaint the public with the flour, so that it has become widely known as of unusual excellence and as of higher price than the ordinary patent flour, and large quantities of it are sold in Seattle and King county. That it is necessary to operate the mill to its full capacity in order to continue the business at a profit. That the flour is sold in all of its markets in constant and keen competition with many other brands of patent flour of all qualities, and the quantity of plaintiff's flour so sold is only a very small part of the pure blended flour and of the quantity of ordinary patent flour sold in each of such markets. That it is necessary to sell the flour through all retail dealers in each community rather than through one or two, as may be profitably done with ordinary patent flours, so that the good will of the retail dealers is necessary to the success of the company. That in order to keep this good will it is necessary to maintain a minimum retail price offering a reasonable profit to the retailer. That, if the uniform minimum price is not maintained, the reputation of the flour will be injured, the good will of the dealers lost, and the plaintiff will be prevented from operating its mill at a profit. That the defendant conducts a retail grocery store in Seattle, and on or about October 3, 1911, entered into an oral contract with the plaintiff, agreeing to purchase from the plaintiff a car load of this flour at the uniform wholesale price, and further agreeing not to sell the flour at less than a certain minimum retail price. That these prices were the same as the wholesale and retail prices maintained by the plaintiff and its other customers, and permit no more than a reasonable profit. That, according to the contract, the plaintiff delivered an installment of the flour on this purchase; the defendant accepting therewith a written invoice containing the following stipulation: "Retail prices. Our flour is sold on condition, which is made a part of the consideration of the sale of said goods, that the purchaser, if he retails the same, will maintain our fixed minimum retail selling prices, and if he wholesales them, they are sold subject to the same conditions. Nothing in the above conditions shall prevent the purchaser from fixing the selling price in excess of the above lists when cost of transportation or other local conditions necessitate the same." That, since the delivery of the flour to the defendant, he has violated the agreement by selling the flour at less than the agreed price, and has widely advertised such sales, which price is less than the general retail price of all the other patent flours so sold in Seattle and the state of Washington. That his purpose in so doing is to attract customers to his store, and that he has threatened to continue this practice. That

the defendant's action in this respect is causing damage to the plaintiff by injuring the reputation of the flour with the public and destroying its sale to retailers in Seattle and throughout the state. That, by reason of defendant's action, other retailers are threatening to follow his example, which will curtail the sales of the flour and cause irreparable damage to the plaintiff. That it has already decreased the sales of the flour, by rendering it unpopular with the retailers, to the plaintiff's damage in the sum of \$1,000. That the plaintiff has no adequate remedy at law.

The defendant demurred to the complaint upon the ground that it does not state a cause of action, and that the court has no jurisdiction of the subject-matter. The demurrer was sustained, and, the plaintiff electing to stand upon its complaint, the action was dismissed. The plaintiff appeals.

A single question is presented: Has a manufacturer, who has given a reputation to particular goods which he creates, the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods shall be sold to consumers?

It may be premised as a postulate that a manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation not inhibited by statutory enactment or inimical to a sound public policy.

It is not claimed, on the one hand, that the contract in question is inhibited by any statute of this state. No question of interstate commerce is involved. We are therefore not here concerned with the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Nor is it claimed, on the other hand, that the fact that the article sold was under a trade-name or in a trade dress, or the fact that it was manufactured by a patented process, affords the contract an immunity from invalidity which it would not otherwise possess. These things must be regarded as immaterial to this discussion. No question of public service corporations is involved. What we shall say has no application to contracts of corporations charged with public functions or duties as such.

The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the subject, have been designated as "contracts in restraint of trade," and those more correctly designated as "contracts in restraint of competition." The term "contracts in restraint of trade" has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly

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established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts, when without limit as to time or place, are invalid. *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355. The broader doctrine inhibiting, as contrary to public policy, all contracts which, by any other means, tend unreasonably to restrict competition, is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. See note to *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 238, 239; *Noyes, Intercorporate Relations*, § 336; 2 *Eddy, Combinations*, §§ 719, 722; *Cooke, Combinations, Monopolies & Labor Unions* (2d Ed.) § 160.

This broader doctrine is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained, or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last we are not here concerned. It is manifest that in case of such contracts the public interest is not conserved by mere limitations either as to time or space. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. *Noyes, Intercorporate Relations* (2d Ed.) § 357. Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general—that is to say, complete—restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable. It is not fairly necessary to the protection of the manufacturer. Having a monopoly, he needs no protection. It is not in any sense beneficial to the public, because it does not tend to create an incentive to increased excellence of product in order to maintain the better price, but, because of the monopoly, has a contrary effect.

And again, when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case,

there is no main lawful purpose to subserve which partial restraint is permissible; hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260.

But it does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity in a given market in any degree is obnoxious to public policy. At common law, contracts containing limited restrictions on competition as incidental to some main contract and not entered into for the sole purpose of suppressing competition or controlling the market are not always and necessarily invalid [citing authorities].

It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order to injuriously affect the public; but, unless it be held that every restriction is *per se* illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. ^{§3} Considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer, or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public. * * *

The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered, and that, of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain, a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to

the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy.⁵

Measured by our definition, which, as it seems to us, is as stringent as any fair construction of the authorities will sustain, the facts and circumstances as alleged in the complaint disclose no sinister purpose in the contract pleaded, nor any tendency inimical to the public interest. It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers of that locality, it would doubtless be the result of an agreement, secret or otherwise, between them, and all such contracts would be invalid as in aid of a combination in restraint of competition. The coincidence would be almost conclusive evidence of the illegal combination, and sufficient basis for declaring all of the contracts void. No such condition, however, is presented by the record before us.

Such a contract as that here in question is of interest to the public only where the whole of a given commodity, or a measurable approximation to the whole of that commodity, is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. It is monopoly, either actual or approximate, hence potential, against which the public interest is arrayed, not a fair reward to individual effort and initiative, which is as essential to competition as a competitive price. In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price

⁵ Quotations from *Nordenfelt v. Maxim-Nordenfelt Co.*, printed ante, p. 109, and from *Dr. Miles Medical Co. v. Parke & Sons Co.*, printed ante, p. 636, are here omitted.

will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition.

Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in competition in prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both, hence is on all scores, against public policy. But where a given product is not in the hands of one man or a combination of men, there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to enable him to maintain an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest, so far as it is touched by the contract, is in sympathy with it, because served by it.

Applying the principles which we have developed from the cases, it seems clear that this contract is valid. The facts alleged negative the idea of any existing monopoly in the appellant, and the contract has no tendency to create one. The retail selling price was fixed merely as ancillary to the contract of sale to the respondent. The fixing of the price was reasonably necessary to protect the appellant, and reasonable as applied to the public, in that it provides only for a fair profit. Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high grade flours while maintaining the excellence of its product.⁶

We do not hold that a mere notice printed on the packages or bill of lading in the absence of express contract to be bound by such notice would be sufficient to create a valid restriction of the sale price, however unobjectionable. We do not hold that a manufacturer would have the right by any such notice to pursue his product into the hands of third parties and fix their selling price. The right, where it can be exercised at all, rests in contract, and it would seem that the contract should only be held binding upon the parties to it, except where the breaking of the contract is induced by the fraud of the third party. As observed in *Dr. Miles Medical Co. v. Parke & Sons Co.*, supra:

⁶ An extended review of authorities at this point is omitted.

"Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement." See, also, *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, and *Bobbs-Merrill Co. v. Straus*, supra [210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086].

Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. *Mazetti v. Armour & Co.*, 135 Pac. 633. His reputation as a manufacturer, one of his chief assets, is bound up in them. The attitude of the respondent, who has willfully violated his contract, presents no equities in his favor. The allegations of the complaint show that the public interest will in no wise suffer from an enforcement of the contract. As between the parties, the appellant is entitled to the relief for which he prays.

The judgment is reversed.

BOSTON STORE OF CHICAGO v. AMERICAN GRAPHOPHONE CO.

(Supreme Court of the United States, 1918. 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.)

Bill by the American Graphophone Company and the Columbia Graphophone Company against the Boston Store of Chicago. From an order granting an injunction (225 Fed. 785), the defendant appealed to the Circuit Court of Appeals for the Seventh Circuit, which certified four questions to the Supreme Court.

Mr. Chief Justice WHITE delivered the opinion of the Court.⁷

⁷ This case is abridged by omissions from the statement of the facts and from the discussion of the questions raised.

* * * The American Graphophone Company, a West Virginia corporation, as assignee of certain letters patent of the United States was the sole manufacturer of Columbia graphophones, grafonolas, records and blanks, and the Columbia Graphophone Company, also a West Virginia corporation, was the general agent of the American Company for the purpose of marketing the devices above stated.

"The American Company, acting through its agent, the Columbia Company, employs in the marketing of its phonographic records and its other products a system of price maintenance, by which system it has been its uniform practice to cause its agent, the Columbia Company, to enter into * * * contracts * * * in the name of the Columbia Company, with dealers in phonographic records, located in the United States and its territorial possessions, to whom the American Company delivers its product, through the Columbia Company, by which it is provided, in part, that in consideration of the prices at which prescribed quantities of the various said products of the American Company are agreed to be delivered to such dealer, the dealer, in turn, obligates himself or itself in selling such products to adhere strictly to and to be bound by and not to depart from the official list prices promulgated from time to time by the Columbia Company for said products, and further expressly covenants not in any way to dispose of any such products at less than such list prices. The American Company fixes and prescribes the prices of its said products, and said contracts when entered into cover all such products of the American Company which may thereafter from time to time be acquired by such dealers from the Columbia Company, without any new express price restriction contract being entered into at the time when each order for goods subsequent to the entering into of said contract is placed or filled by said dealers.

"In pursuance of said price maintenance system the Columbia Company, acting under said instructions and as the agent of the American Company, entered into [such] contracts with over five thousand dealers in phonographic records located in the United States and its territorial possessions."

The Boston Store, an Illinois corporation established at Chicago, dealt with the American Company through its agent, the Columbia Company, conformably to the system of business which was carried out as above stated. The contract evidencing these dealings, which was typical of those by which the business system was carried on was entered into in October, 1912, and contained the following clauses:

"No Jobbing Privileges Extended under This Contract.

"Notice to Purchasers of 'Columbia' Graphophones, Grafonolas, Records, and Blanks.

"All 'Columbia' Graphophones, Grafonolas, Records and blanks are manufactured by the American Graphophone Company under certain

patents and licensed and sold through its sole sales agent the Columbia Phonograph Company (General), subject to conditions and restrictions as to the persons to whom and the price at which they may be resold by any person into whose hands they come. Any violation of such conditions or restrictions make the seller or user liable as an infringer of said patents.

"After reading the foregoing notice and in consideration of current dealers' discounts given to me/us by the Columbia Phonograph Company (General) I/we hereby agree to take any Columbia product received by me/us from said company, either directly or through any intermediary, under the conditions and restrictions referred to in said notice and to adhere strictly and be bound by the official list prices established from time to time by said company and that I/we will neither give away, sell, offer for sale, nor in any way dispose of such goods, either directly or through any intermediary, at less than such list prices, nor induce the sale of such goods by giving away or reducing the price of other goods, nor sell or otherwise dispose of any of said goods, directly or indirectly, outside of the United States, and I/we understand that a breach of this agreement will amount to an infringement of said patents and subject me/us to a suit and damages therefor. I/We admit the validity of all patents under which said product is manufactured and hereby covenant and agree not to question or contest the same in any manner whatsoever. I/We further understand and agree that this license extends the right to market said Columbia product from the below mentioned address only, and that a separate contract is required to market said product from a branch store or stores, or through an agent or agencies at any other point.

"I/We acknowledge the receipt of a duplicate of the foregoing notice and contract and that no representations or guarantees have been made by the salesman on behalf of said company which are not herein expressed. I/We also acknowledge receipt of the official list prices on all Columbia product in force at the date hereof."

This contract contained a note specifying large rates of discount from the list prices for purchases made under its terms, and contained a reference to other lists of net prices covering particular transactions and to the "current Columbia catalogues for list prices on machines, records and supplies."

Under this contract at the time and also subsequent to its making the Columbia Company delivered to the Boston Store at Chicago a number of graphophones and appliances made by the American Company at the sums fixed in the contract as above stated. This suit arose from a disregard by the Boston Store of the rule as to maintenance of price fixed in its contract, that is, from selling the articles at a less price than that which the contract stipulated should be maintained and the bill was filed against the Boston Store by the American and Columbia Companies to enjoin the alleged violations of the contract. While the

certificate is silent as to the averments of the bill, in the argument it is stated and not disputed that it was based on a right to make the contract for the maintenance of prices in and by virtue of the patent laws of the United States and the resulting right under such laws to enforce the agreement as to price maintenance as part of the remedy given by the patent law to protect the patent rights of the American Company. The court enjoined the Boston Store as prayed from disregarding the terms of the contract as to price maintenance. (D. C.) 225 Fed. 785. On appeal the court below made the certificate previously stated and propounded four questions for our decision.

In a general sense the questions involve determining whether the right to make the price maintenance stipulation in the contract stated and the right to enforce it were secured by the patent law, and if not, whether it was valid under the general law, and was within the jurisdiction of the court on the one hand because of its authority to entertain suits under the patent law or its power on the other to exercise jurisdiction because of diversity of citizenship. We at once say, despite insistence in the argument to the contrary that we are of opinion that there is no room for controversy concerning the subjects to which the questions relate, as every doctrine which is required to be decided in answering the questions is now no longer open to dispute as the result of prior decisions of this court, some of which were announced subsequent to the making of the certificate in this case. Under this situation our duty is limited to stating the results of the previous cases, to briefly noticing the contentions made in argument concerning the nonapplicability of those results to the case in hand, and then to applying to the questions the indisputable principles controlling the subjects which the questions concern. * * *

In *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, it was settled that the exclusive right to vend a copyrighted book given by the copyright law did not give to the owner of the copyright and book the right to sell for a price satisfactory to him and by a notice placed in the book fix a price below which it should not be sold by all those who might subsequently acquire it; and that as such a right was not secured by the copyright law or the remedies which it afforded, a court of the United States had no jurisdiction to afford relief on the contrary theory.

In *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, it was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the moveable parted with when it was not subject to his will because owned by another, and thus to make the will of the

seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law.

In *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, it was held that the owner of a patented machine (a rotary mimeograph) and the patents which covered it had in selling the same a right to contract with the purchaser not to use materials essential for working it unless bought from the seller of the machine and to qualify the condition as a license of the use; that this right included the further right by notice on the machine of the contract to affect a third person who might deal with the purchaser with knowledge of the contract and notice so as to make him liable as a contributory infringer if he dealt with the buyer in violation of the terms of the notice. It was further decided that the right to make such contract arose from the right conferred by the patent law and that jurisdiction to enforce it as against the contributory infringer existed under that law. At the time this case was decided there was one vacancy on the bench and one member of the court was absent. There was division, four members concurring in the ruling which the court made and three dissenting.

Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, again involved the right of a seller to impose a restraint on the price of future sales. It arose on a certificate from the Court of Appeals of the District of Columbia asking whether the right asserted was within the monopoly conferred by the patent law and whether therefore the duty to enforce it under that law obtained and the power to give the remedy sought as a means of preventing an infringement of the patent existed. Pointing out that although the restriction on future price which the certificate stated was indisputably void and unenforceable under the general law as the result of the ruling in the *Miles Medical Case*, *supra*, it was held that that ruling was not necessarily apposite because the certificate and the question presented restricted the case to determining whether the right to limit the price existed because within the monopoly granted by the patent law and whether the relief asked was within the remedy which that law afforded. Considering the case in that limited aspect, it was decided: (a) That the exclusive right to vend given by the patent law had the same significance which had been affixed to that word in the copyright law in the *Bobbs-Merrill Case*, *supra*. (b) That hence when the holder of a patented article had sold it, the article so sold passed out of the monopoly and the right to make future sales by one who bought it was not embraced by the patent law and consequently that law could not be extended so as to perpetuate its control beyond the limits to which by the operation of law it reached. In other words,

the decision was that a patentee could not use and exhaust the right to sell as to which a monopoly was given him by the patent law and yet by conditions and stipulations continue that law in effect so as to make it govern things which by his voluntary act were beyond its scope. And (c) that as a result, where an article had been sold and passed beyond the monopoly given by the patent law, remedies on the theory of infringement were not applicable to acts done which could not have that character. It was hence answered that the controversy and the remedies invoked were not within the patent law. As the case dealt with the right to vend under the patent law, the court reserved any express statement concerning the scope of the right to use conferred by that law.

In *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, the right to fix a permanent marketing price at which phonographs should be resold after they had been sold by the patentee was considered. Basing its action upon the substance of things, and disregarding mere forms of expression as to license, etc., the court held that the contract was obviously in substance like the one considered in the *Miles Medical Co. Case* and not different from the one which had come under review in *Bauer v. O'Donnell*. Thus brushing away disguises resulting from forms of expression in the contract and considering it in the light of the patent law, it was held that the attempt to regulate the future price or the future marketing of the patented article was not within the monopoly granted by the patent law in accordance with the rule laid down in *Bauer v. O'Donnell*.

The general doctrines, although presented in a different aspect, were considered in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187. The scope of the case will be at once made manifest by the two questions which were certified for solution:

"First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?

"Second: May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?"

The case therefore directly involved the general question of the power of the patentee to sell and yet under the guise of license or otherwise to put restrictions which in substance were repugnant to the rights which necessarily arose from the sale which was made. In other words, it required once again a consideration of the doctrine

which had been previously announced in *Henry v. Dick* and of the significance of the monopoly of the right to use conferred by the patent law which had been reserved in *Bauer v. O'Donnell*. Comprehensively reviewing the subject, it was decided that the rulings in *Bauer v. O'Donnell* and *Straus v. Victor Talking Machine Co.* conflicted with the doctrine announced and the rights sustained in *Henry v. Dick*, and that case was consequently overruled. Reiterating the ruling in the two last cases it was again decided that as by virtue of the patent law one who had sold a patented machine and received the price and had thus placed the machine so sold beyond the confines of the patent law, could not by qualifying restrictions as to use keep under the patent monopoly a subject to which the monopoly no longer applied.

Applying the cases thus reviewed there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be equally no doubt that the power to make it in derogation of the general law was not within the monopoly conferred by the patent law and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred.

Thus concluding, it becomes we think unnecessary to do more than say that we are of opinion that the attempt in argument to distinguish the cases by the assumption that they rested upon a mere question of the form of notice on the patented article or the right to contract solely by reference to such notice is devoid of merit since the argument disregards the fundamental ground upon which, as we have seen, the decided cases must rest. Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of patent rights and articles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation.⁸ * * *

Mr. Justice BRANDEIS, concurring.

Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ apparently from those entertained by a majority of my Brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law

⁸ Mr. Justice Holmes and Mr. Justice Van Devanter dissented, holding the questions should be answered affirmatively.

for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to.

FEDERAL TRADE COMMISSION v. BEECH-NUT
PACKING CO. ✓

(Supreme Court of the United States, 1922. 257 U. S. 441, 42 Sup. Ct. 150,
66 L. Ed. —, 19 A. L. R. 882.)

Mr. Justice DAY delivered the opinion of the Court.

This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, which court set aside an order of the Federal Trade Commission requiring the Beech-Nut Packing Company, a corporation engaged in the manufacture and sale of food and other products throughout the United States, to cease and desist from carrying out a plan of resale of its products. *Beech-Nut Packing Co. v. Federal Trade Commission*, 264 Fed. 885.

The Commission condemned the plan as an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act. 38 Stat. 719 (Comp. St. § 8836e).⁹

The case was heard before the Commission upon an agreed statement of facts, from which, among other things, it found:

The Beech-Nut Packing Company customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy and tobacco lines, who in turn resell to retailers in these lines. Such wholesale and retail dealers are selected as desirable customers because they are known or believed to be of good credit standing; willing to resell at the resale prices suggested by the company and who do resell at such prices; are willing to refuse to sell and who do refuse to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by the company, and who do not sell to such jobbers, wholesalers, and retailers, who in other respects are good and satisfactory merchandisers. Such jobbers, wholesalers and retailers are designated by the company as "selected" or "desirable" dealers. In a few instances the company also sells "direct" to certain large retailers who are selected as the jobbers, wholesalers and retailers. The total number of such dealers, handling the products of the company, includes the greater portion of the jobbers, wholesalers, and retailers, respectively, in the grocery trades, and a large proportion of the jobbers, wholesalers and retailers in the drug, candy, and tobacco trades respectively, throughout the United States.

The company has adopted and maintained, and still maintained at the

⁹ A part of the statement of facts is omitted.

time complaint was filed by the Commission, in the sale and distribution of its products a policy known as the "Beech-Nut policy," and requests the co-operation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

In order to secure such co-operation and to carry out the Beech-Nut policy the company:

Issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

Requests and insists that the selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the company, and requests and insists that such jobbers, wholesalers and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by the company.

Makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold "direct" or not, that if they, or any of them fail to sell at the resale prices suggested by the company, it will absolutely refuse to sell further supplies of its product to them, or any of them, and will also absolutely refuse to sell to any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, and retailers failing to resell at the prices suggested by the company.

The company, in the carrying out of its policy has refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not sell at the prices so suggested by it. It has refused and does refuse to sell to practically all such jobbers, wholesalers, and retailers reselling to other jobbers, wholesalers, and retailers who had failed to resell at the prices so suggested by it. It has refused and does refuse to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses frequently sell at cut prices, and has refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses. It has refused and does refuse to sell to practically all so-called price cutters. It has maintained and does maintain a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as "turnover orders"; its salesmen, under respondent's instructions, have refused and do refuse to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold at less than the suggested resale prices, or sell or have sold to jobbers, wholesalers and retailers who sell or have sold at less than such suggested resale prices, and in such cases has requested such retailers to name other jobbers.

The company has and does reinstate as distributors of its products jobbers, wholesalers, and retailers previously cut off or withdrawn

from the list of selected jobbers, wholesalers, and retailers for failure to resell at the prices suggested by it, and for selling to distributors who do not maintain such suggested resale prices, upon the basis of declarations, assurances, statements, promises, and similar expressions, as the case may be by such distributors, respectively, who satisfy the company that such distributors will thereafter resell at the prices suggested by it and will refuse to sell to distributors who do not maintain such suggested resale prices.

The company has added and does add, to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by it, and will refuse to sell to those who do not maintain such suggested resale prices. It has utilized a system of key numbers or symbols stamped or marked upon the cases containing the "Beech-Nut brand" products, thus enabling it, for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, when instances of price-cutting have been reported to it by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by it to investigate, and that in pursuance of these instructions they have by means of these key numbers or symbols traced the price-cutters from whom the goods have been obtained, and have thus ascertained the identity of such price-cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased "Beech-Nut brand" products; and has thereafter refused to supply all such dealers with its products; whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices.

The company has and does maintain card records containing the names of thousands of jobbing, wholesale, and retail distributors, including the selected distributors, and in furtherance of its refusal to sell goods either to distributors selling at less than the suggested resale prices, or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon those cards, bearing the names of such distributors, the words "Undesirable—Price Cutters," "Do Not Sell," or "D. N. S.," the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distributor was in the future not to be supplied with respondent's goods on account of failure to maintain the suggested resale prices, or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When the company has received declarations, assurances, statements, promises, or similar expressions, as the case may be, by distributors which satisfy it that such distributors will resell at the prices suggested by it, and discontinue selling to distributors failing to maintain the resale prices suggested by it, it has issued instructions to "clear the record," or directions of similar im-

port, notation of which is made on the cards, and it has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the company's list of so-called "selected" jobbers, wholesalers, and retailers, and no distributor is thus listed on such card record as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by it or sells to distributors failing to resell at such suggested price; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested retail prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who supply the distributor, of this fact, and also notifies its specialty salesmen, and gives similar notices to such jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its list of "selected" jobbers, wholesalers, and retailers.

The Circuit Court of Appeals was of opinion that the only difference between the price-fixing policy condemned as unlawful in *Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and the price-fixing plan embodied in the Beech-Nut policy was that in the former case there was an agreement in writing, while in this case the success or failure of the plan depended upon a tacit understanding with purchasers and prospective purchasers. While it expressed its difficulty in seeing any difference between a written agreement and a tacit understanding in their effect upon the restraint of trade, it, nevertheless, regarded the case as governed by the decision of this court in *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, and accordingly, held that the Commission had exceeded its power in making the order appealed from.

The Colgate Case was prosecuted under the Sherman Anti-Trust Act (Comp. St. § 8820 et seq.), and came to this Court under the Criminal Appeals Act (Comp. St. § 1704). We therein held that this Court must accept the construction of the indictment as made in the District Court; and, that upon such construction, the only act charged amounted to the exercise of the right of the trader, or manufacturer, engaged in private business, to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell, and that thus interpreted no act was charged in the indictment which amounted to a violation of the Sherman Act prohibiting monopolies, contracts, combinations, and conspiracies in restraint of interstate commerce.

In the subsequent case of *United States v. Schrader's Son, Inc.*, 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471, this Court had occasion to deal with a case under the Criminal Appeals Act, wherein there was a charge that a manufacturer sold to manufacturers in several states under an agreement to observe certain resale prices fixed by the ven-

dor—which we held to be a violation of the Sherman Anti-Trust Act. In referring to the Colgate Case we said:

“The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Company v. Park & Sons Co.*, where the effort was to destroy the dealers’ independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Co. made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated as alleging only recognition of the manufacturer’s undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.”

In the still later case of *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208, 41 Sup. Ct. 451, 65 L. Ed. 892, wherein this court again had occasion to consider the subject, it was said of the previous decisions in *United States v. Colgate* and *United States v. Schrader’s Son, Inc.*, *supra*: “Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.”

By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress. The case now before us was begun under the Federal Trade Commission Act which was intended to supplement previous anti-trust legislation. See Report, No. 597, of the Senate Committee on Interstate Commerce, June 13, 1914, 63d Congress, 2d Session. That act declares unlawful “unfair methods of competition” and gives the Commission authority after hearing to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the act, is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act. See Report, No. 597,

Senate Committee on Interstate Commerce, June 13, 1914, 63d Congress, 2d Session.

Of the Federal Trade Commission Act we said, in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 Sup. Ct. 572, 575 (64 L. Ed. 993): "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

If the "Beech-Nut system of merchandising" is against public policy, because of "its dangerous tendency unduly to hinder competition or to create monopoly," it was within the power of the Commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer.

The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices "suggested" by it. If he fails so to do, he is subject to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as "Undesirable—Price Cutters," to whom goods are not to be sold, and who are only to be reinstated as one whose record is "clear" and to whom sales may be made upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices.

From his course of conduct a court may infer—indeed, cannot escape the conclusion—that competition among retail distributors is practically suppressed for all who would deal in the company's products are constrained to sell at the suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated or who are on the company's list of undesirables until they are restored to favor by satisfactory assurances of future compliance

with the company's schedules of resale prices. Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

Under the facts established we have no doubt of the authority and power of the Commission to order a discontinuance of practices in trading, such as are embodied in the system of the Beech-Nut Company.

We are, however, of opinion that the order of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company.

The judgment of the Circuit Court of Appeals is reversed, and the cause remanded to that court, with instructions to enter judgment in conformity with this opinion.

Reversed.

Mr. Justice HOLMES dissenting.

There are obvious limits of propriety to the persistent expression of opinions that do not command the agreement of the Court. But as this case presents a somewhat new field—the determination of what

is unfair competition within the meaning of the Federal Trade Commission Act—I venture a few words to explain my dissent. I will not recur to fundamental questions. The ground on which the respondent is held guilty is that its conduct has a dangerous tendency, unduly to hinder competition or to create monopoly. It is enough to say that this I cannot understand. So far as the Sherman Act is concerned I had supposed that its policy was aimed against attempts to create a monopoly in the doers of the condemned act or to hinder competition with them. Of course there can be nothing of that sort here. The respondent already has the monopoly of its own goods with the full assent of the law and no one can compete with it with regard to those goods, which are the only ones concerned. It seems obvious that the respondent is not creating a monopoly in them for anyone else, although I see nothing to hinder its doing so by conveying them all to one single vendee. The worst that can be said, so far as I see, is that it hinders competition among those who purchase from it. But it seems to me that the very foundation of the policy of the law to keep competition open is that the subject-matter of the competition would be open to all but for the hindrance complained of. I cannot see what that policy has to do with a subject-matter that comes from a single hand that is admitted to be free to shut as closely as it will. And to come back to the words of the statute I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends upon the respondent's will. I see no wrong in so doing, and if I did I should not think it a wrong within the possible scope of the word unfair. Many unfair devices have been exposed in suits under the Sherman Act, but to whom the respondent's conduct is unfair I do not understand.

Mr. Justice McKENNA and Mr. Justice BRANDEIS concur in this opinion.¹⁰

¹⁰ The dissenting opinion of Mr. Justice McReynolds is omitted.

CHAPTER IX

UNFAIR ADVERTISING

AMERICAN WASHBOARD CO. v. SAGINAW MFG. CO.

(Circuit Court of Appeals of the United States, 1900. 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.)

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. This cause is in this court on appeal from an order of the Circuit Court denying an injunction as prayed for in the bill, and also to reverse the decree sustaining a demurrer to the bill, and dismissing the same. A perusal of the bill discloses a case which invokes the equitable jurisdiction of the court because of the interference of the defendant with the trade and good will of complainant in the manufacture and sale of certain aluminum washboards, for which complainant claims to have adopted as a trade-name the word "Aluminum," stamped upon the washboards. It may be stated at the outset that the case is not one for the protection of a trade-mark. It is well settled that a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, cannot be employed as a trade-mark, and the exclusive use of it entitled to legal protection [citing *Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 581; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 547, 11 Sup. Ct. 400, 34 L. Ed. 1003; *Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 626, 35 L. Ed. 248].

In the brief for appellant it is stated that the case is one of unlawful competition in trade, and it has been argued upon that basis. A brief summary of the bill shows that it contains the following statements: That the complainant is engaged in the manufacture and sale of washboards. That its goods enjoy a high reputation in the market of the United States and elsewhere, having been sold in large quantities. That the superior quality of the washboard so manufactured and sold by complainant had acquired a high reputation with the public. That the complainant, at some date prior to the date of the wrongs complained of in the bill (the exact time not being stated), had devised and manufactured a washboard, the rubbing face of which was made of aluminum. That said metal, on account of its cost, was regarded as one of the precious metals. That its capacity and adaptability to said purpose was unknown up to and at the time complainant adopted it, and by a trial and test showed its adaptability for that purpose. That, the word "Aluminum" never having been used in connection with or applied to a washboard, complainant adopted the word as a trade-mark or trade-name for its aluminum washboards, but did not then go into the business of making and selling said washboards, but, owing to the

high price of sheet aluminum, its use was at that time, from a commercial standpoint, practically prohibitive, for which reason complainant suspended the manufacture of such washboards. Afterwards the selling price of aluminum became materially reduced, and though the defendant, about that time, made and sold aluminum washboards—perhaps 50 or 100—and represented that it had adopted the word “Aluminum” as a trade-mark or trade-name, defendant never engaged generally in the business and did not secure any rights to said name. That the selling price of aluminum became so low that it was profitable to resume the manufacture of aluminum washboards, which complainant did, and stenciled the name on each washboard, which trade-mark or trade-name it has since continuously used to its great benefit and advantage. The public has recognized the fitness of the name, the exclusive right of complainant thereto, and said complainant has made large sales of boards thus branded, and has demonstrated the capability of such washboards. Complainant made only the rubbing face of such washboards of pure aluminum, so that purchasers have come to know or distinguish them by that name; and, but for the illegal acts of defendant, washboards so branded would be recognized as containing a rubbing face of pure aluminum. That complainant, upon entering upon the manufacture of such washboards, made a contract with the Pittsburg Reduction Company, which is a large producer of aluminum, and the only producer of said metal in the United States, whereby it contracted for and purchased and has acquired and will continue to acquire the entire output of sheet aluminum suitable for forming the rubbing sheets of washboards produced or on sale in the United States. That by extensive advertising it built up its present business. That it has expended large sums of money and much time in introducing such washboard under such trade-name. Complainant avers, that defendant, well knowing the facts set forth in the bill, has been and now is engaged in the manufacture of washboards in the Eastern district of Michigan and elsewhere, which are branded “Aluminum,” advertised by said defendant as aluminum, and sold under that name. That said washboards are not made of aluminum in any part. That in fact no ascertainable quantity is used in the manufacture, particularly in the rubbing sheet thereof. That, being thus branded with the word “Aluminum,” and so advertised, purchasers and users are induced to believe that the rubbing sheet is made of aluminum, and induced to buy them from that belief. The fact is that the rubbing sheet of said washboard is made of zinc, long used for such purpose, and containing no aluminum. The washboards manufactured by defendant are approximately the same size and shape as complainant's, and being branded with the word “Aluminum” further tends to mislead purchasers, “so that, when intending to purchase a genuine article (of which complainant is the sole manufacturer), they are led to purchase a fraudulent and falsely branded article of defendant's manufacture, to the great and irreparable injury

of your orator therein, as also to the great and lasting injury of the public." And further complainant says it has a right to represent truthfully the quality of its manufacture by the word "Aluminum"; that so long as it continues to be the sole manufacturer of washboards made of pure aluminum, as it expects to continue to be, it has a right to the exclusive use of said name as a trade-mark or trade-name for a washboard, especially as against defendant's misleading use of the same word. The bill prays for the protection of complainant's alleged exclusive right.

The question presented is, is the case thus stated one which entitles complainant to a remedy by injunction and accounting against the defendants? There are numerous cases in the reports upon the subject of unfair competition in trade. From the general principle running through them all it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. Plaintiff comes into a court of equity in such cases for the protection of his property rights. The private action is given, not for the benefit of the public, although that may be its incidental effect, but because of the invasion by defendant of that which is the exclusive property of complainant [quoting from *Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 583; *Goodyear India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 168, 32 L. Ed. 537; *McLean v. Fleming*, 96 U. S. 251, 24 L. Ed. 828; *Chemical Co. v. Meyer*, 139 U. S. 544, 11 Sup. Ct. 627, 35 L. Ed. 249; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523].

Applying this doctrine to the allegations of complainant's bill, we do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade-mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board "Aluminum" not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in

such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises [quoting from *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, 11 H. L. Cas. 523; *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640].

It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the Legislature, and not the courts, must provide a remedy. Courts of equity, in granting relief by injunction, are concerned with the property rights of complainant [again quoting from *Leather Cloth Co. v. American Leather Cloth Co.*, supra].

If the doctrine contended for by complainant in this case was to be carried to its legitimate results, we should, as suggested by Mr. Justice Bradley in the case of *New York & R. Cement Co. v. Coplay Cement Co.* (C. C.) 44 Fed. 277, open a Pandora's box of litigation. A person who undertook to manufacture a genuine article could suppress the business of all untruthful dealers, although they were in no wise undertaking to pirate his trade. Says Mr. Justice Bradley: "The principle for which counsel for complainant contends would enable any crockery merchant of Dresden or elsewhere interested in the particular trade to sue a dealer of New York or Philadelphia who should sell an article as Dresden china, when it is not Dresden china. * * * A dry-goods merchant selling an article of linen as Irish linen could be sued by all the haberdashers of Ireland and all the linen dealers of the United States."

Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum? There is a widespread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the Legislature, and not from the courts. A

class of cases is cited and much relied upon wherein geographical names have been sustained as trade-names in cases of unfair competition in trade, although not technically trade-marks. These cases seem to establish the doctrine that geographical names, such as "Minneapolis," applied to flour, may be adopted as a trade-name, so that one who undertakes to pirate the trade of another who has established among purchasers this designation of his goods will be entitled to an injunction against one who seeks to avail himself of the reputation thus acquired by imposing upon the public his goods as the goods of complainant. An examination of these cases shows that they are based upon the doctrine which we have already shown to be the basis of equitable interference [citing Pillsbury-Washburn Flour-Mills Co. v. Eagle, 30 C. C. A. 386, 86 Fed. 608; Gage-Downs Co. v. Featherbone Corset Co. [C. C.] 83 Fed. 213].

Nor do we find anything in the allegations of the bill as to complainant's monopoly in the use of the metal aluminum for washboard purposes which would extend its rights. We are not referred to any case nor can we think of any reason why one who has obtained a monopoly in the material of which his goods are made should have any broader rights in protecting his trade-name than another who is engaged in competition in the same line of business. The intended adoption of the word "Aluminum" as a trade-mark prior to its use in the manufacture and sale of washboards fails to strengthen the case of complainants, as was said by Judge Coxe in *George v. Smith* (C. C.) 52 Fed. 830: "It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it. The law deals with acts, not intentions." See, also, *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812, and *Manufacturing Co. v. Beeshore*, 8 C. C. A. 215, 59 Fed. 572.

The allegations of complainant's bill in this case show that it did not establish its right to use the trade-name "Aluminum" until after the manufacture of boards by defendant. Upon the whole case we are of opinion that complainant's bill lacks the essential allegations necessary to make the case entitling it to the relief sought, and we are of opinion that the demurrer to the bill was properly sustained. This decision makes it unnecessary to pass upon the ruling on the motion for a preliminary injunction. If the bill was demurrable, it cannot authorize the granting of an injunction, and therefore the ruling of the court below was correct in that respect. The decree and order of the court will be affirmed.

NEVILLE v. DOMINION OF CANADA NEWS CO.

(Court of Appeal. [1915] 3 K. B. Div. 556.)

The plaintiff was a director of Canadian Capital Investments, Limited, a company engaged in the sale of land in Canada and elsewhere, and hereinafter called the land company.

In the year 1912 the land company was advertising for sale certain sections of property outside the city boundary of the city of Regina, Saskatchewan. These advertisements were seriously criticized by the Press as misleading. The Chamber of Commerce of Regina passed a resolution protesting against them, and about the same time certain reputable newspapers declined to continue the advertisements of the land company in respect of that particular property.

The defendants were the publishers and proprietors of Canadian News, a weekly magazine in which they professed to give information and advice to intending investors in Canadian land. The paper had been published for some months in 1912, and the plaintiff had during the months of October, November, and December of that year lent the defendant company various sums amounting in all to £1,490. at least.

By an agreement dated January 24, 1913, and made between the defendant company of the first part, the plaintiff of the second part, and Alexis Maria de Beck of the third part, after a recital that the plaintiff had advanced to the defendant company the sum of £1,490., it was agreed (inter alia) as follows: (a) That the defendant company should pay to the plaintiff the sum of £750. by weekly installments of not less than £10. each, commencing on February 1, 1913; (b) that the defendant company should no longer publish in Canadian News any advertisement of the land company and all accounts due to the defendant company from the land company should be treated as having been paid and discharged; (c) that the defendant company should not publish in Canadian News or in any other newspaper or periodical published by the defendant company any comment upon the land company, or its directors, or its business, or in regard to the land owned by the land company in or near Regina, Saskatchewan, or any comment upon any company with which the defendant company had notice that the land company was connected or concerned; (d) that if the defendant company should duly and punctually pay the weekly installments of £10. until the sum of £750. had been received from the defendant company by the plaintiff and provided that all other agreements on the part of the defendant company therein contained had been faithfully observed and performed, then the plaintiff would accept the sum of £750. in full satisfaction of the debt of £1,490., but in the event of the defendant company making default in paying any installment on its due date or committing any breach, non-observance, or non-performance of any of the terms on its part thereinbefore contained, then the sum of £1,490. less any sum paid on account should become im-

mediately due and payable by the defendant company to the plaintiff; and (e) that that agreement and the performance of the terms thereof should be treated as operating in full settlement of all claims as between the defendant company and the plaintiff and as between the plaintiff and A. M. De Beck, and the parties thereto agreed that all contracts and obligations as between the defendant company and the plaintiff and as between the plaintiff and A. M. De Beck should be treated as merged in that agreement except so far as to the contrary expressly appeared.

In the issue of Canadian News for February 15, 1913, the next issue after the date of the above agreement, there was a paragraph by A. M. De Beck on Canadian News, its object and its policy, which, so far as material, was as follows: "And then as regards investors and those who would interest themselves in Canadian finance and real estate, my 'Gold and Glitter' column speaks for itself. That column alone means work of the hardest description. Often I am unable even to go to bed so tremendous is the labour involved by this special branch of my paper. I am often severely criticised by my jealous enemies on that very point, and yet I can honestly say that there is not one opinion in it concerning stocks, shares, real estate or the like which has been given without the most careful investigation. * * * I am not going to be deterred from doing my duty by jealous critics, by unfair and unjust remarks. I am not to be deterred from doing my duty. I intend to walk straight along that path which I laid down for myself when I started this paper. I intend to expose fearlessly and without favour every fraudulent concern, every doubtful realty, and to protect and assist all those firms that deal fairly and honestly in real estate and first-class investments. I have an ideal before me and I intend to follow that ideal."

After the defendant company had duly paid weekly installments of £10. to the amount of £550., the plaintiff commenced this action, alleging breaches of the agreement on the part of the defendant company by publishing comments upon a company with which to the knowledge of the defendant company the land company was connected or concerned and also by commenting upon the land company and its business and upon the plaintiff himself. The plaintiff sought to recover under the agreement £940., the balance of the original sum of £1,490. after giving credit for the £550. paid by installments.

At the trial before Atkin, J., in November, 1914, the jury found that the defendant company had committed a breach of the agreement, but the learned judge dismissed the action on the ground that the term of the agreement, by which the defendant company agreed not to publish any comments, was invalid as being both in restraint of trade and contrary to public policy and unenforceable in a court of law, and consequently that there had been no breach of the agreement. His judgment upon the points of law was as follows:

ATKIN, J. I am asked to decide whether or not this contract is enforceable. It is said that it is in restraint of trade. It appears to me quite plainly that it is in fact a negative stipulation; in other words, a stipulation restraining the liberty and the right of the proprietor of the newspaper to comment truly upon matters which are precisely within the sphere of operation of the company, and it is, I think, plainly in restraint of trade. It does not necessarily follow, of course, that it is unenforceable merely for that reason, but if, in fact, that stipulation goes further than is necessary for the protection of the person who has procured that restraint for himself and stipulated for it, then I think it would be unenforceable. Is it more than was reasonably necessary for the protection of the business of the plaintiff company? I think it clearly was. The stipulation is in the widest terms, and, as I say, it prevents any comment upon another company of any sort or kind, whether laudatory or critical; and it prevents that comment, whether it is a comment to expose a fraud or whether it is a comment to advance the interests of the company itself. I think it is far more than is reasonably necessary to protect the interests—and by that I think it must mean the legitimate interests—of the company, to provide that no comment of the nature that I have described can be made. For that reason, to my mind this agreement is unenforceable by reason of its being in restraint of trade, and therefore contrary to public policy.

But in my opinion, without invoking the doctrine of restraint of trade, this covenant is also unenforceable. It cannot, I think, be doubted but that if a person were to stipulate to refrain from criticism in order to further the fraudulent schemes of any company, the person so agreeing would be exposed to the very serious danger of being held to be engaged in a criminal conspiracy to defraud, whether there was any particular scheme in project at the time or whether fraudulent schemes generally were being contemplated. I do not, of course, say for a moment that that was the case here; there is no evidence upon which I can find that at all. I think the law goes beyond that, and, to my mind, for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes, when it is the ordinary business of the company to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a court of law.

The effect of what I have said is this: that this stipulation is, to my mind, an invalid stipulation, and cannot be enforced. Therefore there has been no breach of the agreement, and therefore the event has not happened upon which this sum of £750. or £940. has become payable.¹ * * *

There must be judgment for the defendants, but I think it will appear clearly from what I have said that I am by no means satisfied with the conduct of the defendants in this particular case. I find that

¹ The discussion of a point in pleading and a part of the opinion of Lord Cozens-Hardy, M. R., are omitted.

they have entered into this stipulation knowing full well the circumstances under which the stipulation was bargained for and given; I think that there has been a serious dereliction of duty on the part of the defendants in this case, and therefore, while I give them judgment, I give them judgment without costs.

The plaintiff appealed.

LORD COZENS-HARDY, M. R. This is an appeal from a judgment of Atkin, J., who has given judgment for the defendants, without costs, in an action in which the plaintiff sued for a sum of £1,490. on the footing of an agreement of January, 1913. The point raised is this—that the agreement itself is one which, by reason of a particular clause, is tainted in this sense, that no action can be brought upon the agreement. * * *

The defendant company were carrying on the business of newspaper proprietors. It is the business of newspaper proprietors, dealing specially with Canada, and dealing plainly with land purchase in Canada, to comment upon Canadian matters; but this clause provides that this trading company is not to publish “in Canadian News or in any other newspaper or periodical published by the company any comment upon Canadian Capital Investments, Limited, or its directors, or its business, or in regard to the land owned by Canadian Capital Investments, Limited, in or near Regina, Saskatchewan, or any comment upon any company with which the company have notice that Canadian Capital Investments, Limited, are connected or concerned.” That seems to me to be a covenant in restraint of trade. But that alone is not enough to enable us to say whether it is contrary to public policy. I have not heard a word to suggest that it is a “reasonable restraint of trade” in the manner in which those words are used. It is surely wider than is reasonably necessary for any protection to which the plaintiff could possibly be entitled. It is not limited to any attacks upon the plaintiff, and it is not limited to comments upon any land company with which the plaintiff might have anything to do. It seems to me to be plainly a covenant in restraint of trade in this sense: that it is far wider than was reasonably necessary for the protection of the plaintiff.

Needless to say it is perfectly well settled that it is for the court, and not for a jury, to decide as to the reasonableness of such a covenant. It is for the court, and the court alone—we are the persons who have to say whether it is reasonable, in the sense in which I have used the word, and I have no hesitation in saying that it is not reasonable.

That being so, it is perhaps not strictly necessary for me to consider, but if it were necessary for me to consider it I should hesitate a good deal before I came to the conclusion, that what I regard as a bribe paid by the plaintiff to secure complete absence of comment upon any land near Regina with which the land company was concerned was a transaction which could be regarded as otherwise than against

public policy. But, as I said, I base my judgment, as the learned judge I think did, upon the ground of restraint of trade. Whichever way you look at it, in my opinion the learned judge was right in saying that no action could be maintained on this agreement, one of the considerations for which was this illegal clause. That being so, I think the appeal fails and must be dismissed with costs.² * * * *

WARRINGTON, L. J. I agree. The defendants in this case are the proprietors of a newspaper. They have taken upon themselves to advise their public on certain land and financial schemes. They have a particular column in their paper which is called the "Gold and Glitter" column, and their editor has made a great parade in this column of the mode in which in that respect he proposes to conduct the affairs of his newspaper. The defendants have taken upon themselves, therefore, the position of advising people, and advising people honestly, as to the merits of certain schemes, and in particular schemes referring to land in Canada.

The plaintiff was a person who was interested in a company engaged in land speculations in Regina, Saskatchewan. I infer from the agreement which is the subject of the present proceedings that up to the time of the agreement the plaintiff and the person acting with him had more or less controlled the defendants' paper. One object of the agreement appears to have been a change in the directorate which would have eliminated the element of the plaintiff's control of the paper. That being so, and the plaintiff severing his connection with the paper, and being a creditor, to a large amount, of the defendant company, the plaintiff gave up something like half his debt in consideration, among other things, of a stipulation that the newspaper would make no comment whatever on the conduct of the plaintiff's company, or rather the land company in which the plaintiff was interested, or its directors or its business, or in regard to the land owned in Regina, Saskatchewan, or any comment upon any company with which the land company was concerned and connected, and with which the newspaper company had notice that it was so concerned or connected. That was the nature of the stipulation. But just see what that might land this newspaper in! The newspaper has assumed a position of giving honest advice to persons concerned in such matters. Let us assume that the land company in which the plaintiff is concerned, or some company with which that company is connected, propounds some fraudulent scheme, and the editor of the paper knows it. By this stipulation he is bound to refrain from making any comment on that fraudulent scheme, and it seems to me that by so abstaining he may actually and actively mislead his public into supposing that there is nothing in the suggestion that the particular scheme is a fraudulent scheme. In other words, he has, I think, accepted a bribe the tendency of which is to prevent him from doing that which

² The opinion of Pickford, L. J., is omitted.

under certain circumstances, and having regard to his own conduct, it may be his duty to do.

I prefer to put my judgment on that ground, but I agree with the MASTER OF THE ROLLS and PICKFORD, L. J., that the contract into which the defendants have entered is a contract in restraint of trade.³

Appeal dismissed.

SEARS, ROEBUCK & CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1919. 258 Fed. 307, 169 O. C. A. 323, 6 A. L. R. 358.)

Before BAKER and ALSCHULER, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge.⁴ This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck & Co., a corporation, commanding the petitioner to desist from certain unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the commission and also before this court on review is prescribed in section 5 of the act to create a Federal Trade Commission, approved on September 26, 1914 (38 Stat. 719, c. 311 [Comp. St. § 8836e]). Respondent's authority over the subject-matter of its order is derived from the following provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 (Comp. St. § 8836d) is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years last past has practiced unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

(1) By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale.

(2) By advertising that petitioner is selling its sugar at a price much lower than that of its competitors and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar.

³ The remainder of this opinion is omitted.

⁴ A part of this opinion, relating to collateral questions, is omitted.

(3) By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts.

(4) By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors, and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

"We can afford to give this guarantee of a 'less than wholesale price' because we are among the largest distributors of sugar wholesale or retail in the world. We sell every year thirty-five million pounds of sugar. And, buying in such vast quantities, and buying directly from the refineries, we naturally get our sugar for less money than other dealers."

"For instance, every grocer carries granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for? Our teas have a pronounced, yet delicate, tea flavor with an appealing fragrance because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce. First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil. Also, by buying direct from the tea gardens, while the crops are being harvested, we are able to have them always perfectly fresh. It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason: By buying direct from the tea gardens we cut out the middleman's profit."

"Over land and sea, from the greatest coffee regions in the world we bring you the choicest of the crop, and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices."

Petitioner's sales of sugar during the second half of 1915 amounted to \$780,000 on which it lost \$196,000. Petitioner used sugar as a

"leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources, of the same quality and at the same price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent. of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative Peterson in Japan; but there was no proof that Peterson made or was qualified to make "selections in person" or "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false and designed to deceive the public and injure competitors.

By the order, issued on June 24, 1918, petitioner was commanded to desist from:

"(1) Circulating throughout the states and territories of the United States and the District of Columbia catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers or prospective customers of said defendant or to customers of competitors, or to the public generally, or leads them to believe, that because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors.

"(2) Selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers and customers of its competitors.

"(3) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly and honestly with their customers.

"(4) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special repre-

sentative to Japan who personally goes into the tea gardens of said country and personally supervises the picking of such teas.

"(5) Circulating through the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its coffees, in which it falsely stated that the defendant purchases all of its coffees direct from the best plantations in the world."

* * * Petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions" or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely and uniformly understood that the general term "rebates or concessions" and "schemes to defraud" are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as *parens patriæ*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This *prima facie* reading of legis-

lative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the commission and the court to a prescribed list of specific acts. Cong. Rec. 63d Cong. 2d Session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. 731, c. 323), condemning certain specific acts.

But such a construction of section 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 365, 27 Sup. Ct. 367, 51 L. Ed. 523; *Penn. Rld. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915D; 315; *National Pole Co. v. Chicago & N. W. Ry. Co.*, 211 Fed. 65, 127 C. C. A. 561.

With the increasing complexity of human activities many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commer-

cial world at the times in question, and that the action of the commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as above stated; and in other respects the petition is denied.⁵

FEDERAL TRADE COMMISSION v. WINSTED
HOSIERY CO.

(Supreme Court of the United States, 1922. 258 U. S. —, 42 Sup. Ct. 384, 66 L. Ed. —.)

Mr. Justice BRANDEIS delivered the opinion of the court.

The Winsted Hosiery Company has for many years manufactured underwear which it sells to retailers throughout the United States. It brands or labels the cartons in which the underwear is sold as "Natural Merino," "Gray Wool," "Natural Wool," "Natural Worsted," or "Australian Wool." None of this underwear is all wool. Much of it contains only a small percentage of wool; some as little as 10 per cent. The Federal Trade Commission instituted a complaint under section 5 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 719, and called upon the company to show cause why use of these brands and labels alleged to be false and deceptive should not be discontinued. After appropriate proceedings an order was issued which, as later modified, directed the company to "cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the words 'Merino,' 'Wool,' or 'Worsted,' alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g., 'Merino, Wool, and Cotton'; 'Wool and Cotton'; 'Worsted, Wool, and Cotton'; 'Wool, Cotton, and Silk'), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g., part wool)."

A petition for review of this order was filed by the company in the United States Circuit Court of Appeals for the Second Circuit. The prayer that the order be set aside was granted, and a decree to that effect was entered.

The original order of the Commission was based on findings which rested upon an agreed statement of facts. The petition for review urged, among other things, that the agreed statement did not support the findings. Thereupon the Commission moved in the Court of Ap-

⁵ An opinion, in which Alschuler, Circuit Judge, dissents in part, is omitted.

peals that the case be remanded to the Commission for additional evidence as provided in the fourth paragraph of section 5 of the act. Under leave so granted the evidence was taken; and modified findings of fact were made. The modified order was based on these findings. It is this modified order which was set aside by the Court of Appeals, and we have no occasion to consider the original order or the proceedings which led up to it.

That court said: "Conscientious manufacturers may prefer not to use a label which is capable of misleading and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so." 272 Fed. 957, 961. The case is here on writ of certiorari. 256 U. S. 688, 41 Sup. Ct. 625, 65 L. Ed. 1172.

The order of the Commission rests upon findings of fact; and these upon evidence which fills three hundred and fifty pages of the printed record. Section 5 of the act makes the Commission's findings conclusive as to the facts, if supported by evidence.

The findings here involved are clear, specific, and comprehensive: The word "Merino" as applied to wool "means primarily and popularly" a fine long staple wool which commands the highest price. The words "Australian Wool" mean a distinct commodity—a fine grade of wool grown in Australia. The word "wool" when used as an adjective means made of wool. The word "worsted" means primarily and popularly a yarn or fabric made wholly of wool. A substantial part of the consuming public, and also some buyers for retailers and sales people, understand the words "Merino," "Natural Merino," "Gray Merino," "Natural Wool," "Gray Wool," "Australian Wool," and "Natural Worsted," as applied to underwear, to mean that the underwear is all wool. By means of the labels and brands of the Winsted Company bearing such words part of the public is misled into selling or into buying as all wool underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen who knowingly sell to their customers as all wool underwear which is largely composed of cotton. Knit underwear made wholly of wool has for many years been widely manufactured and sold in this country and constitutes a substantial part of all knit underwear dealt in. It is sold under various labels or brands, including "Wool," "All Wool," "Natural Wool," and "Pure Wool," and also under other labels which do not contain any words descriptive of the composition of the article. Knit underwear made of cotton and wool is also used in this country by some manufacturers who market it without any label or marking describing the material or fibers of which it is composed, and by some who market it under labels bearing the words "Cotton and Wool" or "Part Wool." The Winsted Company's product, labeled and branded as above stated, is being sold in

competition with such all-wool underwear and such cotton and wool underwear.

That these findings of fact are supported by evidence can not be doubted. But it is contended that the method of competition complained of is not unfair within the meaning of the act, because labels such as the Winsted Company employs, and particularly those bearing the word "Merino," have long been established in the trade and are generally understood by it as indicating goods partly of cotton; that the trade is not deceived by them; that there was no unfair competition for which another manufacturer of underwear could maintain a suit against the Winsted Company; and that even if consumers are misled because they do not understand the trade signification of the label or because some retailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition.

This argument appears to have prevailed with the Court of Appeals; but it is unsound. The labels in question are literally false, and, except those which bear the word "Merino," are palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels, and not to deliberate deception by the retailers from whom the consumer purchases. While it is true that a secondary meaning of the word "Merino" is shown, it is not a meaning so thoroughly established that the description which the label carries has ceased to deceive the public; for even buyers for retailers and sales people are found to have been misled. The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.

The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer,

not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition. *Von Mumm v. Frash* (C. C.) 56 Fed. 830; *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 722, 119 C. C. A. 164; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 155, 46 N. E. 386, 60 Am. St. Rep. 377. And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 538, 23 Sup. Ct. 161, 47 L. Ed. 282. As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued.

Reversed.

Mr. Justice McReynolds dissenting.

ROYAL BAKING POWDER CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1922. 281 Fed. 744.)

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

Petition to Revise an Order of the Federal Trade Commission.

ROGERS, Circuit Judge.⁶ The Federal Trade Commission on February 4, 1920, caused a complaint to be issued against the Royal Baking Powder Company, a corporation organized under the laws of the state of New Jersey. The Royal Baking Powder Company, hereinafter referred to as the petitioner, is engaged in manufacturing and selling in interstate commerce, and in competition with many other concerns similarly engaged, baking powders not only under its own name but in the name of its constituent companies, and particularly the Price Baking Powder Company, which was one of four preexisting corporations with which it was consolidated.

The complaint alleges that the petitioner is engaged in violating the provisions of section 5 of the Act of Congress approved September

⁶ A part of the statement of facts is omitted.

26, 1914, 38 Stat. 717 (Comp. St. §§ 8836a-8836k). That is the act which created the Federal Trade Commission and defined its powers and duties. The petitioner in due time filed its answer and testimony was taken, and after oral argument before the commission, the commission made its findings and issued the order which we are now asked to review.

Section 5 of the act among other things declares: "That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers; subject to the acts to regulate commerce from using unfair methods of competition in commerce."

The commission in carrying into effect the provisions of the act is authorized to institute proceedings against those it has reason to believe are violating the terms of the statute. The proceedings which the commission is authorized to institute are not punitive and no form of punishment is provided. It is not intended that compensation is to be made for any injuries which may have been suffered. The intent of the act is the prevention of injury to the general public. What the commission is created to deal with is not acts of unfair competition but the use of unfair methods of competition.

The act provides that if at the hearing the commission is of the opinion that the method of competition in question is prohibited by the act it shall make a report in writing in which it shall state its findings as to the facts, and that it shall issue an order requiring the person, partnership, or corporation found to be engaged in such unfair method "to cease and desist from using such method of competition"; and the act also provides that in any application to this court, either to enforce the order, or to affirm, set aside, or modify it "the findings of the commission as to the facts, if supported by testimony, shall be conclusive."

The transcript of record which in this case has been filed in this court contains voluminous findings made by the commission, covering 20 printed pages. These findings seem to us to be supported by the testimony, and they are therefore to be accepted and treated as conclusive.

The length of the findings makes it undesirable to incorporate them herein *ipsissimis verbis*, and we are compelled to confine ourselves to a statement of the substance thereof. From the findings as made it appears that the petitioner has been engaged since its organization in 1899 in the manufacture of baking powders and in their sale and shipment in interstate and foreign commerce. In 1899 it acquired the entire capital stock of the Price Baking Powder Company, the Cleveland Baking Powder Company, and a former corporation also known as Royal Baking Powder Company. The baking powder manufactured by the Price Baking Powder Company was known as "Dr. Price's Cream Baking Powder." The Cleveland company manufactured the

"Cleveland Superior Baking Powder," and the former Royal Baking Powder Company the "Royal Baking Powder." And after the petitioner acquired the stock of these companies it continued the manufacture and sale of these three brands of powder. From 1899 to 1917 it had sold "Dr. Price's Cream Baking Powder" under the name of the Price Baking Powder Company, but in 1917 and thereafter up to September, 1919, it manufactured and sold it under its own name.

Baking powder consists of (1) a carbonate, usually bicarbonate of soda, mixed with (2) an acid ingredient capable of reacting with the alkaline carbonate, when moistened, and setting free carbonic acid gas, which gas raises the dough, and (3) a filler, usually flour or cornstarch, which tends to prevent any premature reaction caused by the moisture in the air. The baking powder known as "Dr. Price's Cream Baking Powder" was originated in 1853 by Dr. Vincent C. Price, a physician, and was manufactured by him, and by various firms of which he was a member, up to 1884, when the Price Baking Powder Company acquired the business and continued the manufacture and sale of said baking powder until the business was taken over by the petitioner, and during all of said time and until September, 1919, the said baking powder was a cream of tartar baking powder, and was advertised and sold exclusively as such. Dr. Price never manufactured a phosphate baking powder.

For a period of over 60 years prior to September, 1919, the "Dr. Price's Cream Baking Powder" had been marketed and advertised exclusively as a cream of tartar baking powder, and for at least 35 years (1884-1919) the petitioner and its predecessor, the Price Baking Powder Company, carried on an extensive advertising campaign throughout 22 states in the middle and western sections of the country to establish in the minds of consumers the superiority, especially from the point of view of healthfulness, of its cream of tartar baking powder and the inferiority of the baking powders manufactured and sold by competitors and containing phosphate or alum, or both, as their acid ingredients, which competing powders were represented by the petitioner to be unwholesome and deleterious.

Through circulars, pamphlets, cookbooks, newspapers, and other forms of advertising the petitioner for many years prior to September, 1919, warned the purchasing public against the use of phosphate baking powders and asserted that cream of tartar was the only acid ingredient which should be used in baking powder. It emphasized the wholesomeness and food value of cream of tartar and maintained that phosphate was unwholesome and dangerous as an ingredient, was produced either by dissolving bones in oil of vitriol or from rocks formed by the action of the excreta of birds and animals on limestone. It referred to phosphate as "bone acid" or "lime phosphate," and alleged that it was of purely mineral origin, left objectionable mineral residues in the food, and many other statements to the same or similar effect.

It further asserted that it had never manufactured any but exclusively cream of tartar powders, that no cream of tartar baking powder ever contained phosphate, and that no phosphate powder ever contained cream of tartar.

By means of such advertising the petitioner was able to sell large quantities of its cream of tartar baking powder under the name "Dr. Price's Cream Baking Powder," in competition with phosphate baking powders and alum baking powders, selling for about one-half and one-fourth, respectively, of the selling price of petitioner's said cream of tartar baking powder. The petitioner continued up to May 28, 1919, to publish and circulate disparaging advertisements concerning baking powders containing such phosphate.

In July, 1919, because of the scarcity and increased cost of cream of tartar, respondent determined to change Dr. Price's Cream Baking Powder, which had been well known for 60 years as a cream of tartar baking powder, to a phosphate powder, and to conserve the available supply of cream of tartar for its other brands. Cream of tartar had increased in price, until at that time it cost more than five times as much as phosphate.

In a "news item for trade papers" petitioner asserted that in view of the high cost and scarcity of cream of tartar, the growing demand for a pure baking powder at a low price, and recent scientific developments in phosphate, which permitted the manufacture of a pure high-grade phosphate baking powder containing no deleterious or objectionable substances at a very much lower price, it had decided to change its well-known Dr. Price brand from a cream of tartar powder to a straight phosphate baking powder, to be sold at approximately one-half its former price after November 1, 1919.

The petitioner began the manufacture of said phosphate powder in September, 1919, and put the same on the market about the middle of November, 1919, in the states of Illinois, Wisconsin, Missouri, and part of Kansas. The label on the new goods was the same as had been previously used on the cream of tartar powder, except that a small circular "World's Fair Award" sticker was omitted from the front panel, and a clause headed "A Pure Phosphate Powder" was printed in red diagonally across the back panel, giving the new ingredients, "Bicarbonate of Soda, Phosphate, Cornstarch." There was retained on this label the declaration in heavy black type, more conspicuous than the red overprint, that the powder contained "Pure Grape Cream of Tartar, Tartaric Acid."

In August, 1919, the petitioner ordered 18,000,000 new labels printed, to be used as the permanent label for the new phosphate baking powder. All of the distinctive features of the old cream of tartar labels were retained on these new labels, including the name "Dr. Price's," which had been advertised for many years as denoting exclusively a

cream of tartar powder and not a phosphate powder. Quotation marks were placed around the word "Cream," registered as a trademark by petitioner, and the design of a cornucopia containing clusters of grapes was modified by changing the grapes to flowers, but retaining the general contour. At the bottom of the front panel the legend "Perfectly Pure" was replaced by the words "A Pure Phosphate Powder" in the same size of type, "Standard for 60 years," became "Makers for 60 years," and various other minor changes were made.

These new permanent labels, the commission found, were so like the labels previously used by petitioner on the cream of tartar powder in arrangement of lettering and design, in coloration and general appearance, as to cause the one to be mistaken for the other and to confuse and mislead purchasers familiar with the former product as to the character of the contents of the new cans. In its efforts to avoid as far as possible any striking modification of the general appearance of the containers, respondent caused the bottom of the new cans to be forced up to make allowance for the smaller bulk of the phosphate goods. The petitioner's president regarded any change in the general appearance or coloration of the label inadvisable.

The new phosphate powder was introduced first in the states of Illinois, Wisconsin, Missouri, and a portion of Kansas in November, 1919, and, at the same time, the petitioner began an advertising campaign in newspapers, trade journals, and on billboards, window posters, card displays, and motion picture films. In these advertisements the fact that the new powder was to be offered to the public at about one-half of the former price was given emphasis. In some instances the advertisements failed to make any mention whatever of the change from cream of tartar to phosphate as the acid ingredient. In others a reference was made to the body of the advertisement to the use of "new methods of production with pure phosphate." No mention of phosphate appeared in the headings of any of the advertisements prior to the beginning of the proceeding before the commission, except that three of the advertisements bore the caption "The 'Cream' of Phosphate Baking Powders."

The following are examples, which might easily be multiplied, of respondent's advertisements of the new powder which contained no mention of phosphate:

• "What One Neighbor Told Another.

"Have you heard the good news? The price of Dr. Price's Baking Powder has been reduced nearly one-half. When the grocer told me, I just threw away that alum mixture I have been using, and ordered a can of

"Dr. Price's Baking Powder.

"A name famous for 60 years is a guaranty of quality," etc.

Again:

"Don't increase the high cost of living by spending your shrunken dollar and risking your health, for doubtful baking powders when you can now get

"Dr. Price's Baking Powder

at about one-half the former cost. A name famous for 60 years assures quality and dependability."

Again:

"Putting More in the Market Basket.

"The greatly reduced price of Dr. Price's Baking Powder enables you to put more good things in your market basket. The saving will help pay for the flour and other things you put in your cakes, and besides you are assured of the wholesomeness of

"Dr. Price's Baking Powder,

"A name famous for quality for 60 years."

In addition, the petitioner used for advertising purposes billboard posters and motion picture slides which tended to create the belief on the part of the public that the new powder which it was placing on the market was in fact Price's Baking Powder, which had been well known for 60 years as a cream of tartar powder, and to conceal or obscure the fact that it was a radically different powder.

The commission found that the advertising was false and misleading in representing to the public that the price of said new phosphate baking powder had been reduced to about one-half its former cost when in fact the price of said powder had been at all times the same, and petitioner's use on a phosphate baking powder of a brand which had by its own efforts become identified exclusively with a cream of tartar powder as opposed to a phosphate powder, which latter type of powders respondent had for many years denounced as undesirable and unhealthful, was calculated and designed to deceive and did deceive the public, and especially such part of the public as was accustomed to obtain a pure cream of tartar baking powder under the well-known brand "Dr. Price's Baking Powder."

The commission also found that petitioner's said advertising and its said conduct in using said well-recognized brand or name upon a phosphate baking powder tended, under the circumstances hereinbefore set forth, unfairly to hinder and obstruct the business of competitors engaged in manufacturing and selling cream of tartar baking powder at their normal prices, which were approximately double the prices asked by respondent for said phosphate powder.

The commission further found that the petitioner's method of advertising and branding also tended unfairly to hinder and ob-

struct the business of respondent's competitors engaged in the manufacture and sale of phosphate baking powders in competition with said phosphate baking powder of respondent selling at an alleged reduced price under a name used for 60 years on an exclusively cream of tartar powder.

The commission therefore declared that the petitioner was using unfair methods of competition in interstate and foreign commerce in violation of the Act of September 26, 1914. It thereupon issued its order directing the petitioner to cease and desist from:

"(1) Using on the new phosphate baking powder manufactured by it the so-called 'overprint label,' or the so-called 'new label' heretofore used by it, or any label simulating or resembling in coloration, design, or general appearance the labels formerly used by respondent on its 'Dr. Price's' brand of cream of tartar baking powder.

"(2) Selling, or advertising for sale, said phosphate baking powder under the name 'Dr. Price's' or 'Price's,' unless the word 'cream' is omitted and the word 'phosphate' is incorporated as part of the name of said baking powder on the labels thereof and in the advertisements relating thereto.

"(3) Advertising or representing, in connection with the sale of said phosphate baking powder, that respondent's 'Dr. Price's' cream of tartar brand of baking powder has been reduced in price.

"(4) Representing, by advertising or otherwise, that said phosphate baking powder is the baking powder sold by respondent for many years under its 'Dr. Price's' brand."

This court is satisfied upon a careful examination of the transcript that the findings are amply justified by the evidence; and this leaves as the sole question for us to determine whether the order is one within the jurisdiction of the commission and therefore valid.

The petitioner contends that misrepresentation of the quality or ingredients of one's own goods is not "an unfair method of competition" within the meaning of the Federal Trade Commission Act. Counsel for the petitioner argues that no statute or decided case has declared that a manufacturer or trader owes to his competitors the duty of refraining from misrepresentation of the quality or ingredients of his own goods and that, on the contrary, it has been firmly held that no such duty exists. And it is said that in making the order now under review the commission assumed not only to create a new rule of substantive law but to destroy one of long standing and universal acceptance. And our attention is called to the following cases in support of the above contention: *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609; *Borden's Condensed Milk Co. v. Horlick's Malted Milk Co.* (D. C.) 206 Fed. 949; *Armstrong Cork Co. v. Ringwalt Linoleum Co.* (D. C.) 235 Fed. 458. The first two of these three cases were decided prior to the enactment of the statute which cre-

ated the Federal Trade Commission and defined its powers. The third case is a decision of the District Court of New Jersey and contains no reference to the statute creating the Federal Trade Commission. It was decided upon the authority of the American Washboard Co. Case, which it followed, and which we shall refer to more fully in a moment.

In the District Court the defendant moved to dismiss the bill, under equity rule 29, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was granted, and the case was taken to the Circuit Court of Appeals for the Third Circuit and there reversed, without, however, any expression of opinion upon the merits. That court remanded the case with directions to reinstate the bill, overrule the demurrer, and proceed to final hearing, without prejudice to the right to raise the question as to the sufficiency of the bill. The court added: "We might add that, in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission, this order is made without prejudice to the rights of the parties, while this appeal is pending, to apply for relief to that body if it so desires. *Armstrong Cork Co. v. Ringwalt Linoleum Works*, 240 Fed. 1022, 153 C. C. A. 665." Afterwards this matter was brought before the Federal Trade Commission, and an order was made by it to cease and desist from using the word "linoleum," and from such order no appeal was taken.

In the American Washboard Co. Case the complainant was the manufacturer of a washboard having the rubbing face made of aluminum and upon which it used the word "Aluminum" as a trade name. It was the only manufacturer of such boards in the country, having secured a monopoly of all the sheet aluminum produced which was suitable for use in their manufacture. The bill which asked for an injunction alleged that the defendant had placed on the market a washboard on which it used the word "aluminum" by reason of which the public was deceived into buying it as a genuine aluminum washboard, although there was none of that metal in its composition. The Circuit Court of Appeals for the Sixth Circuit, then composed of Judges Taft, Lurton, and Day, each of whom later became a member of the Supreme Court, held that the facts alleged did not entitle the complainant to relief, since it was not shown that purchasers bought defendant's board in the belief that they were made by complainant. In the course of the opinion, which was written by Judge Day, he said: "Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature, and not from the courts."

The above case illustrates the reason which led Congress to enact the statute creating the Federal Trade Commission and making unfair methods of competition unlawful and empowering the commission to put an end to them. By that statute the identical situation which the court in the above case said it was beyond its power to suppress has been brought within the jurisdiction of the Federal Trade Commission—created to redress unfair methods of competition. Before the enactment of the Federal Trade Commission Act the courts appear to have had jurisdiction of an action for unfair competition only when a property right of the complainant had been invaded. But the Federal Trade Commission Act gave authority to the commission itself when it had reason to believe that any person, partnership, or corporation was using any unfair method of competition in commerce, if it appeared to it that a proceeding by it in respect thereof “would be to the interest of the public” to bring such offending party before it to answer to its complaint and after a hearing could, upon good cause shown, require it to cease and desist from its unlawful methods.

The answer to the contention of the counsel for the petitioner is found in a recent decision of the Supreme Court, which has not yet been published. In *Winsted Hosiery Co. v. Federal Trade Commission*, 272 Fed. 957, this court had before it the method of an underwear manufacturing company of branding its products as wool, merino, etc., when in fact they were composed only partly of wool or merino. A great deal of testimony had been taken which this court thought fully established that the trade was not misled in any respect by the label complained of. But some witnesses testified that in their opinion some part of the consuming public was or might be misled into thinking the underwear so described was pure wool. It also appeared that the method of branding which this manufacturer pursued was in accord with the general custom and practice of the underwear trade throughout the United States and was well known to and recognized by the distributors of underwear in this country. We therefore held that the order of the Federal Trade Commission requiring the particular manufacturer to desist from such methods was error and did not constitute unfair competition. The reversal of the case by the Supreme Court has established the principle that advertisements which are false in fact constitute an unfair method of competition, although it was one commonly practiced and not intended to mislead the trade. The labeling of commodities in such a way as to deceive the public is an unfair method of competition. The manufacturer must not brand his goods as “wool” when they are part wool and part cotton. And it is now made plain that the statute has invested the commission with jurisdiction to order anyone who misrepresents the quality of his goods in his advertising to cease and desist from such unfair methods of competition.

In the case now before the court the commission was convinced and its opinion was justified by the evidence that the petitioner in the use of its labels, and otherwise, was employing false and misleading advertising which was calculated and designed to deceive the public and which did deceive the public into buying a phosphate baking powder believing that it was the Dr. Price's Baking Powder, which had been well known for 60 years as a cream of tartar powder, concealing and obscuring the fact that it was a radically different powder. The case is plainly governed by the principle laid down in the *Winsted Hosiery Co. Case*.

The novelty of the present case lies in the fact that the manufacturer is passing off one of his products for another of his own products, and the basis of this proceeding is the deception of the public. In *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358, decided in 1919, the commission had entered an order commanding a mail-order house to desist from circulating catalogues containing advertisements falsely representing to the public that because of its large purchasing power and quick-moving stock it was able to sell sugar at a price lower than its competitors. Manifestly such advertisements tended to injure competitors and to deceive purchasers, and the commission's order was sustained, although it was subjected to verbal modification.

The difference in principle between that case and the one now before us is, at best, simply one of degree. The method of advertising adopted by the Royal Baking Powder Company to sell under the name of Dr. Price's Cream Baking Powder an inferior powder, on the strength of the reputation attained through 60 years of its manufacture and sale and wide advertising of its superior powder, under an impression induced by its advertisements that the product purchased was the same in kind and as superior as that which had been so long manufactured by it. It is apparent that this was unfair alike to the public and to the competitors in the baking powder business. The purpose of the Congress in creating the Federal Trade Commission was aimed at just such dishonest practices, and business concerns that resort to dishonest devices of this nature must understand that they can not add to their revenues or maintain their business standing by methods of competition which the law brands as "unfair" and therefore unlawful.

The order of the commission is affirmed.

NEW JERSEY ASBESTOS CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1920. 264 Fed. 509, 18 A. L. R. 546.)

Petition to Review Order of Federal Trade Commission.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. January 6, 1919, the Federal Trade Commission issued a complaint against the New Jersey Asbestos Company, under section 5 of the Act of September 26, 1914 (Comp. St. § 8836e), entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleging that the company had during the year 1918 been giving to employes of its customers and prospective customers liquors, cigars, meals, theater tickets, valuable presents, and sums of money and entertainments to induce them to influence their employers to purchase the company's products and that a proceeding by the commission in respect thereof would be to the interest of the public.

The company filed an answer, admitting that it is engaged in interstate as well as intrastate business, and that it had paid reasonable amounts in furnishing entertainment to employes of customers, and as incidental to such entertainment had supplied liquors, cigars, meals, and theater tickets, but denying that this was done for the purpose of inducing them to influence their employers to buy its goods, and especially denying that it ever gave them valuable presents or sums of money.

The charge of giving valuable presents and sums of money has been abandoned by the commission. May 27, 1919, the commission filed its report and two findings of fact, and its conclusion of law, as follows:

"First. That the respondent, the New Jersey Asbestos Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, having its principal office and place of business at the city of New York, in the state of New York, and is now, and for more than one year last past has been engaged in manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, throughout the states and territories of the United States, and that at all times hereinafter mentioned, the respondent has carried on and conducted such business in direct competition with other persons, firms, co-partnerships, and corporations manufacturing and selling like products.

"Second. That said respondent, the New Jersey Asbestos Company, in the course of its business of manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, throughout the states and territories of the United States, for more than one year last past, has been lavishly giving gra-

tuities, such as liquor, cigars, meals, theater tickets, and entertainment, to employés of customers as an inducement to influence their employers to purchase or to contract to purchase from the said respondent, the New Jersey Asbestos Company, engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, without other consideration therefor.

"Conclusion.

"That the methods set forth in the foregoing findings of fact, under all the circumstances therein set forth, are unfair methods of competition in violation of the provisions of section 5 of the act of Congress, approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'"

The findings of fact being mere conclusions, it is necessary to examine the evidence to see whether they are supported by any testimony or not. It shows that the officers of the company in the year 1918 did entertain at the company's expense both customers and employés of customers, and that the salesmen down to May 1st were employed on a salary or on a salary and commission basis, and were allowed to charge in their monthly accounts reasonable lump sums for entertainment. After May 1st they were on a commission basis only, and any entertainment given by them was given at their own expense.

We have held in *Federal Trade Commission v. Gratz*, 258 Fed. 314, 169 C. C. A. 330, that only unfair practices which affect the public, as distinguished from individuals, are within the jurisdiction of the commission. We take judicial notice of the fact that the method of entertainment found to be unfair has been an incident of business from time immemorial. It is recognized by article 133 of the regulations covering the assessment of income tax promulgated January 2, 1918 as follows:

"Spending Money.—So-called spending or treating money, if actually advanced by corporations to their traveling salesmen to be used by them as a part of the expenses incident to selling the product of such corporations, is an allowable deduction in a return of income by such corporations. The deduction of such expenditures is conditioned upon a satisfactory showing that all the allowance claimed as a deduction was actually expended for and was an ordinary and usual expense incurred in selling the product or merchandise of the corporation."

The payment of money or the giving of valuable presents to an employé to induce him to influence his employer to make a contract of purchase is a fraud justifying the discharge of the employé within his contract term of service, and perhaps the recovery by the purchaser of the amount or value of such inducement from the seller, upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals, and not one

so affecting the public as to be within the jurisdiction of the commission, under our decision in the Gratz Case, *supra*. However, it stretches theory to the breaking point to suppose that the entertainment expenses found unfair in this case constitute fraud practiced by the respondent and by the employes on the purchasers of the respondent's goods. It is difficult to conceive that the purchaser would have a right to recover the amount of such entertainment as a part of the price paid for the goods bought, or that he would have a right to discharge the employe within the term of his service on this ground. So broad a construction of the statute would bring within the disposition of the commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the government. For instance, advertising is a method of selling goods which, without increasing their merits, increases their cost; and so does securing servants of competitors by paying them higher wages, though we suppose no one would say the act gives the commission a right to regulate these matters.

The order is reversed.

KINNEY-ROME CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1921. 275 Fed. 665, 18 A. L. R. 542.)

Before EVANS and PAGE, Circuit Judges, and CARPENTER, District Judge.

PAGE, Circuit Judge. This is an original petition filed by petitioner to review an order made by the Federal Trade Commission, respondent, in a proceeding wherein respondent had filed its complaint, charging that petitioner was engaged in manufacturing and selling bed springs in interstate commerce in direct competition with other corporations similarly engaged, and that "respondent [petitioner] for more than one year last past, with the intent, purpose, and effect of stifling and suppressing competition in the manufacture and sale of bed springs and kindred products, in interstate commerce, has given and offered to give premiums, consisting of necktie sets, * * * to the salesmen of merchants handling the products of the respondent [petitioner] and those of its competitors, as an inducement to influence them to push the sales of respondent's [petitioner's] products, to the exclusion of the products of its competitors."

The matter was submitted to the respondent upon an agreed state of facts, in substance as follows:

"That the respondent, the Kinney-Rome Company, in the course of its business of manufacturing and selling 'De Luxe' bed springs, has * * * given and offered to give premiums, such as necktie sets, etc., * * * to the salesmen of merchants handling the products of the respondent and those of its competitors, when such salesmen have

been instrumental in making a sale of respondent's 'De Luxe' bed springs; these premiums being given with the knowledge and consent and through arrangements with the merchants who are the employers of said salesmen. * * * Salesmen of respondent's said customers do not explain the above-described system of premiums to persons to whom they sell the said 'De Luxe' bed springs, so far as is known to respondent."

The findings of fact followed the stipulation of facts, and stated this conclusion:

"That the methods of competition set forth in the foregoing findings, as to the facts under the circumstances set forth, are unfair methods of competition in interstate commerce in violation of the provisions of section 5" of the Federal Trade Commission Act of September 26, 1914. 38 Stat. 717 (Comp. St. § 8836e).

Thereupon respondent entered the order here complained of, which is in part: "It is ordered that the respondent * * * cease and desist from directly or indirectly giving * * * premiums, such as necktie sets, * * * to salesmen or employees of merchants handling the products of the respondent and those of one or more of its competitors, where such salesmen or employees have been instrumental in making a sale of the respondent's products."⁷

In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993, it is said: "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."

While the exact words "unfair methods of competition" have not been frequently, if at all, used in the decisions, yet "unfair competition" and "unfair trade," have been repeatedly the subject of consideration and discussion by federal and state courts, and several times in this circuit. In *Pillsbury v. Pillsbury-Washburn, etc., Co.*, 64 Fed. 841, 845, 12 C. C. A. 432, 436, this court said: "The right of appellees to relief is * * * rested upon principles applied by courts of equity in cases analogous to cases of trade-marks, where the relief is afforded upon the ground of fraud."

In *Cole Co. v. Am. Cement & Oil Co.*, 130 Fed. 703, 65 C. C. A. 105, it was stated by this court: "The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good will of a trade built up by his efforts, and sought to be taken from him by unfair methods."

In *Goodyear, etc., Co. v. Goodyear Rubber Co.*, 128 U. S. 598, at page 604, 9 Sup. Ct. 166, 168 (32 L. Ed. 535), it was said: "The case

⁷ Section 5 of the Federal Trade Commission Act is here quoted.

at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

In *Howe Scale Co. v. Wyckoff, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, the court stated: "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *International News Service v. Associated Press*, 248 U. S. 215, at page 241, 39 Sup. Ct. 68, 73 (63 L. Ed. 211, 2 A. L. R. 293), it was said: "It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition [citing *Howe Case*, supra]. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business, because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

See, also, *Keystone Type Foundry v. Portland Pub. Co.*, 186 Fed. 690, 108 C. C. A. 508; *Sterling Remedy Co. v. Eureka Chem. & Mfg. Co.*, 80 Fed. 105, 25 C. C. A. 314; *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26, 30, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; *Bates Mfg. Co. v. Bates, etc., Co.* (C. C.) 172 Fed. 892; *West Pub. Co. v. Ed. Thompson Co.* (C. C.) 169 Fed. 833; *Manitowoc Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543, 97 N. W. 389; *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. (N. S.) 447; *Rocky Mountain Bell Tel. Co. v. Utah Independent Tel. Co.*, 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153; *Bissell Chilled Plow Wks. v. T. M. Bissell Plow Co.* (C. C.) 121 Fed. 357; *Am. Brewing Co. v. Bienville Brewery* (C. C.) 153 Fed. 615.

There are many other cases in the federal courts which cite the *Howe* and *Goodyear* Cases.

It is not conceived that Congress, which laid down no definition whatever, intended to either limit or extend the matters which constituted unfair methods of competition prior to the passage of the Clayton Act (*Curtis Pub. Co. v. Federal Trade Com.* [C. C. A.] 270 Fed. 881, 908), but that its object was the creation of a board of commissioners, who, as stated in the *Sears-Roebuck Case*, 258 Fed. 307, 311; 169 C.

C. A. 323, 327 (6 A. L. R. 358), "are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

We conclude, from the discussion of the term "unfair competition" by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an "unfair method of competition."

Without, perhaps, admitting petitioner's conclusions, even if its premises are true, respondent vigorously assails those premises, saying: "Petitioner's whole brief is based on this false assumption—that the manufacturer is justified in doing whatever the dealer may do."

We are of opinion that the assumption is not false, but is fully justified. The stipulated facts show: "These premiums being given with the knowledge and consent and through arrangements with the merchants who are employers of said salesmen."

It cannot be that a merchant may personally do a thing touching his business that is legal, but that it becomes illegal when done by another through his procurement.⁸ When petitioner did the things complained of through arrangement with the merchants, the merchants became parties to the act. As it effected sales of their property, presumably they profited by the arrangement. If it was lawful as to one, it was lawful as to the other.

In determining whether there was used "an unfair method of competition," it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What, then, may the merchant do? In *United States v. Freight Ass'n*, 166 U. S. 290, at page 320, 17 Sup. Ct. 540, 551 (41 L. Ed. 1007), the Supreme Court said: "The trader or manufacturer * * * carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."⁸

No one, then, having any right to interfere in his business, or to control in any way the resale of his goods, the merchant may do and permit to be done anything in connection with his business that he may see fit, and those he permits to participate in his business may do anything in that business permitted by him, and no one has any right to complain, unless that which is done amounts to a fraud upon his

⁸ Part of the opinion is omitted.

rights. If such right did not belong to the merchant, then he would not have the ordinary rights of contract that belong to every man, and he would be compelled to carry the burdens, risks, and hazards of a business, subject, without his consent, to the control of every manufacturer who might have sold him a bill of goods.

The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered. It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame, and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with the other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public. It needs no discussion to show that that was wholly his competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to any one who does not own the goods.

Likewise the public, if it has an interest in competition has such interest only in the competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

We are of opinion that there can be nothing in the contention that some special interest in a clerk which is undisclosed to the buying public represents an unfair method of competition, because of an incentive and opportunity of the clerk to deceive the public. Undoubtedly the clerk, with the master's consent, may discriminate between the master's goods. All of the buying public, with at least ordinary knowledge and intelligence, knows that a salesman is representing the merchant's interest, and that every merchant may and very frequently does have reason for pushing the sale of one kind of goods more than another; but, if that were not true, it would be little less than an absurdity to say that a salesman, who often is the merchant himself, in order to escape the charge of unfairness, must disclose to every would-be

buyer his interest in the transaction in hand. That is just what the contention, if allowed, would lead to.

Nor is it conceived that there is any danger from falsehood or misrepresentation. A salesman, with the master's consent, may discriminate all he pleases between the goods he has to sell. Neither a salesman having a special interest in one article, where he has many to sell, nor a salesman with a single article to sell, has any right to indulge in falsehood and misrepresentation; but there is here no evidence of falsehood or misrepresentation.

The order to cease and desist is annulled and set aside.

PART III

COMBINATIONS

CHAPTER I

OBJECT OF COMBINATION

MASTER STEVEDORES' ASS'N v. WALSH.

(Court of Common Pleas of New York 1867. 2 Daly, 1.)

This was a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The plaintiffs are a corporation, of which the defendant is a member, and is, as its name imports, an association of master stevedores. The association adopted a by-law or "pledge" to the effect that there should be no variation from the prices adopted by the association, and that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association twenty-five per cent. of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law.

The complaint alleges that the by-law was subscribed to by the defendant, that the corporation had fixed the rate of discharging railroad iron from vessels at thirty-two cents a ton, and that the defendant had discharged fifteen hundred tons in violation of this regulation; that he was consequently found guilty by the association of working for less than the recognized price, and incurred a penalty of \$125, for the recovery of which the action is brought.

DALY, F. J. The complaint is demurred to upon the ground that no action lies upon the facts stated; the specific objection raised by the demurrer being that the by-law is illegal, because the object it is designed to effect is one that is forbidden by law, and that no action can consequently be maintained upon it.

It is declared by Rev. Stat. vol. 1, p. 691, §§ 8 and 9, that it shall be unlawful for two or more persons to conspire to commit any act injurious to trade or commerce, and that the persons so conspiring shall be deemed guilty of a misdemeanor. In *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501, it was held that it was a violation of this statute for a body of journeymen shoemakers in the village of Geneva, in this state, to enter into an association for the purpose of preventing any shoemaker in the village from working below certain rates, which

object the association sought to obtain by imposing a penalty of ten dollars upon any shoemaker in the village who worked for less, and by a mutual agreement among the members of the association that they would not work for any master shoemaker who should employ a journeyman who infringed their rules, unless the journeyman so infringing paid the ten dollars to the association, and which object was carried into effect by a number of the members of the association quitting the employment of a master shoemaker, who had employed a journeyman at rates below those which the association had agreed upon.

The feature which distinguishes this case from the one under consideration is, that coercive measures were there resorted to to compel a compliance, not only on the part of master shoemakers, but of journeymen not members of the association, with the regulations the combination had established. This was undertaking to interfere with the rights of others, and it has frequently been held that combinations to prevent any journeyman from working below certain rates, or to prevent master workmen from employing one except at certain rates are unlawful, and that the parties engaging in such combination may be indicted for a conspiracy. Case of the Journeymen Cordwainers of the City of New York, printed by J. Riley, New York, 1810; Case of Journeymen Cordwainers of Pittsburg, printed at Pittsburg, 1811; Case of the Philadelphia Boot and Shoemakers, Yates' Select Cases, 144; The Philadelphia Journeymen Tailors' Case, Phil. 1827, pp. 103, 160; *People v. Trequier*, 1 Wheeler's Cr. Cas. 142.

In the present case, the by-law was limited in its operation to the members composing the corporation, and is sought to be enforced against one who had voluntarily subscribed to it. In this respect it is distinguished from the case of *People v. Fisher*, and from the other cases above cited; but if all the reasons which Chief Justice Savage assigned for the judgment of the court, in *People v. Fisher*, are to be received as law, they would apply to this case.

They are substantially as follows: That any confederacy or united agreement among journeymen, for the purpose of raising their wages, is an indictable offense at the common law; that journeymen may each, singly, refuse to work unless they receive an advance of wages, but if they do so by preconcert or association, they may be punished for a conspiracy; that if the journeymen bootmakers of the village of Geneva, by extravagant demands enhance the price of labor at that place, boots made elsewhere may be sold cheaper, and it is, therefore, an act injurious to trade, so far as respects the trade of the village of Geneva in that particular article, which is all that is necessary to bring the offense within the statute; that the best interests of society require that the price of labor be left to regulate itself, or be limited by the demand of it; that a combination or confederacy to enhance or reduce the price of it, or of any article of trade or commerce is injurious; that without officious and improper interference, the price

of labor will be regulated by the demand for it; but the right does not exist to enhance it by any fixed artificial means; that a mechanic is not obliged by law to work for any particular price. He has a right to say that he will not make a boot for less than a certain price, but he has no right to say that no other bootmaker shall make one for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess it. All combinations, therefore, to effect such an object are injurious, not only to the particular individual opposed, but to the public at large. That if journeymen bootmakers may say what boots shall be made for, it would be optional with them to say that \$10 or \$50 shall be paid, which would be a monopoly of the most odious kind; that if journeymen can in this way fix their own wages, they would have the power to regulate the price of any manufactured article, and the community might be enormously taxed; that if the journeymen bakers should refuse to work except for enormous wages, and should compel all the journeymen bakers in a city to stop work, the community would be without bread. Such combinations would be productive of derangement and confusion, and if generally entered into would be prejudicial to trade and to the public interest; the truth being that they are wrong in every instance, as industry requires no such means to support it, competition being the life of trade.

Much of what is here said is undoubtedly right, and it is forcibly put. Many of the reasons were applicable to the case before the court, which was correctly determined in accordance with the adjudged cases. The objection, however, is, that some of the propositions stated are not tenable, and that there is an omission throughout, to distinguish between what is entirely lawful for either journeymen or master workmen to do in their collective capacity, upon the subject of wages, and those unlawful combinations where the object is to control the rate of wages by the use of coercive measures.

It is not, nor has it ever been, a rule of the common law that any mutual agreement among journeymen for the purpose of raising their wages, is an indictable offense, or that they are guilty of a conspiracy if, by preconcert and arrangement, they refuse to work unless they receive an advance of wages.¹

The absence, of any adjudication upon this question at the common law may be attributable to the fact that there were statutes in England, from the passage of the Laborers' Act in the reign of Edward III down to the reign of George IV, regulating the rate of wages, and forbidding agreements or combinations to evade these statutes; laws made in the interest of employers, in the creation of which those who were most affected by them had no share. By the Act of Geo. IV, c. 95, all these statutes were repealed, and as this impor-

¹ An extended review of the early criminal cases is omitted.

tant statute was prepared with great care, its provisions may be appropriately referred to, both as indicating the state of common law, and as furnishing a good exposition of what the law ought to be upon this subject. It prohibits all persons from attempting by threats, intimidation, or violence, to force any workman to quit his employment, or to prevent him from hiring himself to, or accepting work from any person, or for the purpose of compelling him to join any club or association, or to contribute to any common fund, or to pay any fine or penalty for not doing so, or for refusing to comply with any regulations made to obtain an advance, or to reduce the rate of wages, or to lessen the hours of labor, or the quantity of work; but the act, at the same time, declares that it shall be lawful for any persons to meet together, for the sole purpose of consulting upon or determining the rate of wages, which the persons so assembling shall require or demand, or the hours or time they will work in their respective employments, and that they may enter into any agreements, verbal or written, among themselves, for the purpose of fixing the rate of wages which the parties so agreeing may demand, and that the persons so uniting and agreeing shall not be liable to any prosecution or penalty for so doing.

The distinction which this statute makes between the legality of associations among workmen for the protection of their interests, by agreeing as a body not to work below certain prices, and an illegal combination formed for the purpose of making it compulsory upon all the journeymen in a particular branch of business, and upon the employers to conform to certain prices by imposing penalties upon the journeymen in a city or town who refuse to do so, or by agreeing as a body not to work for any employer who will employ such a journeyman, or one who will not pay the penalty or become a member of the combination, or which seeks to accomplish such a purpose by violence, intimidation, or other unlawful means, is one that has been slowly arrived at in England, and toward which the courts in this country have been gradually approximating, for the reason that it has its foundation in the plainest principles of justice. The apprehension that if this be conceded, it would place employers wholly at the mercy of their workmen, who would have it in their power to exact any sum for their services, however extravagant, is altogether an imaginary one. It is not possible, by any organization among journeymen, to bring about such a result. The history of English legislation upon the subject of wages, and of the operations of trades-unions, show that it is neither in the power of prohibitory laws nor of artificial combinations to control arbitrarily the price of labor, and that no combination can devise any general regulation or scheme that will bring to the same level the skillful and the incompetent, the diligent and the idle. All such matters regulate themselves. If labor is in demand, the rate of compensation will be enhanced in proportion; and if it is not, no combination among work-

men can prevent the falling of prices. Voluntary associations among workmen, or agreements among them not to work except for certain prices, are effectual only when their demands are just and reasonable, and when they attempt any thing more, they not only fail of their object, but are themselves the chief sufferers. Workmen in every branch or calling are too universally diffused, too dependent upon their necessities, and too diverse in their interests, to make it possible by organization to accomplish any thing beyond this, for if those in any one place ask what is exceptionable or unreasonable, by the natural law of demand and supply, others will come in and take their places.

But it may be in their power to secure by associated effort what it would not be possible for any one of them to accomplish alone; and that they should have the right to associate together for the mutual protection of their individual interest is so plain, that it is singular that it should ever have been questioned. Journeymen may be as well acquainted as their employers with the causes which affect the price of labor, and in this country are generally well informed in such matters. They may be quite as well able to judge whether the ordinary profits of employers justify a reduction or an increase in the rate of wages. Why, then, should they not have the right to come together to consider the condition of the branch of industry in which they are operatives, to impart information to each other, to exchange their views, and discuss in a body a matter in which they are so deeply interested? Merchants meet daily upon 'Change, that they may be thoroughly informed upon all matters relating to the traffic in which they are engaged; and why should not journeymen meet together to consider and act upon a subject so important to them as the general rate of wages. The exact sum which should be required for a day's wages may be fluctuating and uncertain, through the operation of other causes than those of demand and supply, such as the instability of the currency, by which the value of the paper representative of a dollar changes as the circulating medium is increased or diminished. These are matters for the consideration of workmen as well as all other causes affecting the price of their labor; and if they come together, and as the result of their deliberations conclude that a certain rate would be just and reasonable, and that they will not work for less, it would be the height of injustice to call such an act a crime, by declaring that it was, in the language of the statute, unlawfully conspiring to commit an act injurious to trade or commerce, for which each of them may be indicted and punished.

It is better for the law to leave such matters to the action of the parties interested—to leave master workmen or journeymen free to form what associations they please in relation to the rate of compensation, so long as they are voluntary. They mutually act upon

each other. If the workmen demand too much, or the masters offer too little, such a state of things cannot continue long, or be productive of any serious inconvenience to the community, as that party must ultimately give way whose pretensions are not founded in reason and justice. *Regina v. Harris*, 1 Carr. & Marsh. 662. It is otherwise, however, where organizations are formed to intimidate employers, or to coerce other journeymen; and it matters little what are the measures adopted, if the object of them is to interfere with the rights or control the free action of others. It was held, under the English statute I have referred to, that it did not authorize workmen to combine for the purpose of dictating to a master whom he should employ (*Rex v. Rykerdyke*, 1 M. & Kobs, 179); and the several convictions in this country have been in cases where coercive measures were resorted to, either to prevent master workmen from employing journeymen except at certain rates, or to intimidate journeymen from engaging below such rates, or to compel them to become members of the combination. Every man has the right to fix the price of his own labor—to work for whom he pleases, and for any sum he thinks proper; and every master workman has equally the right to determine for himself whom he will employ, and what wages he will pay. Any attempt by force, threat, intimidation, or other coercive means, to control a man in the fair and lawful exercise of these rights is therefore an act of oppression, and any combination for such a purpose is a conspiracy.

It may, therefore, be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeymen pays the penalty imposed by the combination, or by menaces, threats, or intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.

The act under which the defendants are incorporated (Laws of New York 1863, p. 494), declares the object of the corporation to be "the better to promote the business and interests of the several members of the association," and a general power is given to make by-laws not inconsistent with the provisions of the act of incorporation, or of the laws of the State. There was nothing in the by-law inconsistent with the act of incorporation, or with the laws of the State. As individuals, the master stevedores might collectively enter into an agreement not to work under certain rates, and when formed into a corporation, they could, as a corporate body, make a by-law of

that nature, being one, in the language of the statute, "to promote the business and interests of the association." If the by-law is one which it is in the power of the corporation to make, it has the power also to attach to it a penalty for the purpose of enforcing it. All who become members of the corporate body are bound by it, and where the penalty is incurred an action may be brought in the name of the corporation to recover it. *The Tobacco Pipe Makers v. Woodroffs*, 7 Barn. & C. 838; *King v. Clerk*, 1 Salk. 349; *Company of Feltmakers v. Davis*, 1 B. & P. 100; *Binters' Company v. Passy*, 1 Burr. 239, 250; *Guardians of Trinity House v. Crispin*, T. Jones R. 144; *Leathy v. Webster*, Sayre, 251; *Grant on Corporations*, 76, 78, 82, 86, 87. The proper mode of enforcing a by-law is by a pecuniary penalty, for the corporation cannot, either directly or indirectly, impose any forfeiture of goods, or of stock, or other corporate interests for the breach of it (*Matter of the Long Island Railroad Co.*, 19 Wend. [N. Y.] 37, 32 Am. Dec. 429), and the penalty must be certain (*Leathy v. Webster*, *supra*). The words of the by-law are, that the party shall forfeit to the association twenty-five per cent. of the amount of such bill as fixed by the association, which penalty may be collected by due process of law. Though the word forfeit is used, this is not a forfeiture (*Grant on Corporations*, 84, 85, 303), but a pecuniary penalty, and it is sufficiently certain.

This was not a by-law in restraint of trade, for it imposes no restraint upon one party which is not beneficial to the others, and is not, as has been shown, prejudicial to the interests of the public. *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Lawrence v. Kidder*, 10 Barb. 641.

The demurrer must be overruled, with costs.

MORE v. BENNETT.

(Supreme Court of Illinois, 1892. 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216.)

This was a suit in assumpsit, brought by R. Wilson More and others, composing the firm of More & Dundas, against J. L. Bennett and others, composing the firm of Bennett, Edwards & Pettit, to recover damages resulting from an alleged breach of certain rules and by-laws of the Chicago Law Stenographers' Association, of which both the plaintiffs and defendants are members. To the declaration, which consists of two special counts, a demurrer was sustained, and, the plaintiffs electing to abide by their declaration, judgment was rendered in favor of the defendants for costs. Said judgment has been affirmed by the Appellate Court on appeal, and the present appeal is from said judgment of affirmance.

The first count of the declaration alleges, in substance, that the plaintiffs and defendants are all stenographers by profession, and have,

from the time of its organization, been members of said association, an association formed to promote the interest of its members by all proper methods, and to establish and maintain reasonable, proper, and uniform rates for stenographic work done by the members of said association, and to secure to judges, lawyers, and citizens of Chicago efficient, competent, and reliable law reporting, at reasonable, proper, and uniform rates, and to furnish them with the means of obtaining efficient and competent reporters, and to increase the efficiency of law reporting in the county of Cook. That, in accordance with its constitution and by-laws, said association had adopted a schedule of rates which were and are fair and reasonable, and had for more than 15 years prior to the organization of said association been the established rates among law stenographers, and had been and are still recognized as reasonable and established rates by judges and members of the legal fraternity, and by law stenographers of the city of Chicago, there having been during said time no material variation from said rates among law stenographers, said rates being less than those established in certain other large cities of the United States for the same class of work. Said count further alleges that, in consideration of like promises and agreements on the part of the plaintiffs, and like payment of the membership fee of \$5 by each of the plaintiffs to become members of said association, the defendants promised and agreed with the plaintiffs that they would be bound in their charges for work by the schedule of rates adopted by said association. That the defendants might cut rates against persons not members of said association, provided such cutting was in good faith and the rights of the plaintiffs were respected. That in no case where the defendants had any knowledge of the existence of a contract or reporting arrangement between the plaintiffs and any lawyer, corporation, or any other person would they attempt, by underbidding the rate established by said association or other unfair means, to secure such reporting. [Here are set out the rates fixed by the association and the fact that the defendants in the case in question underbid the plaintiffs, charging less than the rates fixed by the association]; the plaintiffs agreeing with said county to do said work, if the county should demand it, at as low a rate as any reputable and established stenographer or firm of stenographers should in good faith bid for said work. That the plaintiffs entered upon the performance of said contract, and were engaged in reporting the proceedings at said trial at said regular rates, yet the defendants, well knowing the premises, and the aforesaid contract or reporting arrangement between the plaintiffs and said county, and after the plaintiffs had been engaged on said case for, to wit, seven weeks, and at a time when defendants well knew that the plaintiff had performed the most unprofitable part of said contract, and not regarding their said promise so made to the plaintiffs, did not respect the rights of the plaintiffs and the schedule rates so adopted by said association, and the fact that they knew that

there was a reporting arrangement or contract between the plaintiffs and said county, but solicited said county, and endeavored to secure from said county, by underbidding and other unfair means, employment as law stenographers to report and furnish transcripts of the proceedings at said trial, and made a certain bid to said county, by which they offered to do said work at a less rate than that established by said association, to wit, \$5 per day for attendance, 20 cents per folio for a single copy, 22 cents per folio for two copies, and all copies above two free of charge. That thereupon the plaintiffs, because of said bid of the defendants, were required by said county to meet said bid, or to cease their employment on said trial, as by the terms of said employment said county had a right to do; and that the plaintiffs, for the purpose of remaining in employment on said trial, did meet the said bid of the defendants, and afterwards reported and furnished transcripts of the proceedings on said trial at the rates offered by the defendants, by means whereof they were deprived of divers gains and profits which would have accrued to them from the reporting and furnishing transcripts on said trial under the regular rates of said association, and in accordance with their original bid, and have suffered great loss and damage through the wrongful conduct of the defendants, to the damage of the plaintiffs in the sum of \$3,000, and therefore they bring their suit, etc.

The second count contains substantially the same allegations as the first, and also the following: That said association numbers among its members only a small portion of the law stenographers of the city of Chicago, and that said association was formed because a system of ruinous competition had sprung up among the stenographers of said city, by which the prices of stenographic work were depressed below reasonable rates, and also because a discreditable and dishonorable system of solicitation for business had sprung up, by which efforts were made on the part of stenographers to induce attorneys, corporations, and other persons to break their contracts already made with other stenographers, and that the objects of said association were to prevent said discreditable and dishonorable solicitation, and to promote the interests of the members thereof by all proper methods, and to establish and maintain proper and uniform rates for stenographic work done by its members.²

BAILEY, J.³ (after stating the facts). * * * Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not

² A further statement of the second count is omitted.

³ Parts of the opinion are omitted.

only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules. The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not, indeed, a subordinate application of the same rule.

* * * Many cases may be found in which the doctrine here stated has been laid down and enforced. [The following cases are here reviewed: *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 4 Denio, 349; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346.]

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons, engaged in a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected. Counsel seek to distinguish this case from those cited by the circumstance, alleged in the second count of the declaration, that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade, which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased.

But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists; the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of

putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection. It may also be observed that, by the constitution of the association, any reputable stenographer, regularly engaged in law reporting in Cook county, is eligible to membership, and, if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters.

We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.

HERRIMAN v. MENZIES.

(Supreme Court of California, 1896. 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81.)

VAN FLEET, J. In this case the defendants appealed to this court from the judgment and from an order denying a motion for a new trial. The appeal from the judgment was heretofore dismissed, and the order denying a new trial affirmed, in department. *Herriman v. Menzies*, 44 Pac. 660. Subsequently the order dismissing the appeal from the judgment was, upon petition therefor, set aside, and a hearing of the motion ordered in bank. Since the last order, the appeal from the judgment has been submitted upon the merits, but without a waiver of said motion to dismiss.

The appeal from the judgment involves but one question—whether the complaint states a cause of action. The objection urged is that the contract which forms the basis of the action, and under which the accounting is asked, is contrary to public policy, and void. The contract is set out in *hæc verba*. It provides for the formation of an association between several firms and individuals engaged in the business of stevedoring in the city of San Francisco under the name of the Master Stevedores' Association, "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association is to continue five years. Certain officers, consisting of president, vice president, and secretary, whose duties are defined, and a standing committee for the auditing of accounts of the members, are provided for. The association is given power through a majority vote of its members to "fix a schedule of prices or charges for any

and all work as stevedores to be done and performed by its members, and they hereby agree that they will each of them observe and abide by such schedule of prices or charges, and that none of them will do or perform any such work at or for less or lower prices, or suffer or allow any discount to be made therefrom, except as may be allowed or authorized by the association." "(9) Each of the firms and parties hereto is to carry on the business of master stevedores, according to the provisions of this agreement, in their own names as heretofore, for the benefit of this association; and each agree to do so in an efficient and economical manner, and that their disbursements shall be subject to examination and approval or disapproval as herein provided." Each member is required to keep full and correct accounts of the business done by him, including all receipts and disbursements, and render statements thereof at stated intervals to the association. The agreement covers all business done by any of the members in San Francisco and the other ports in the state, and provides that any member violating any provision of the contract shall pay to the association a certain amount as liquidated damages.

It is contended that the contract contemplates an illegal scheme and combination to stifle competition in the stevedoring business, and is in restraint of trade, and that its effect is to create a monopoly; and that in these respects it contravenes public policy, and is opposed to good morals, and so constitutes no proper basis for an action either at law or in equity. We are unable to coincide in this construction of the contract, or to perceive anything therein which renders it invalid upon the grounds stated. The objection that its effect is to create a monopoly in and unduly restrict the business of stevedoring does not find support in its terms. A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. Webster defines it as "the sole power of dealing in any species of goods," and Bouvier as "the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise." And these definitions accord with that given by later writers. *Spell. Trusts*, § 133. An agreement, the purpose or effect of which is to create a monopoly, is unlawful if it relate to some staple commodity, or thing of general requirement and use or of necessity, and not something of mere luxury or convenience.

Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to unlawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the con-

trol, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests (*Printing Co. v. Sampson*, L. R. 19 Eq. 465), and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. Appellant says that the purpose of this contract is expressly declared as that of "controlling the business of stevedoring," and that this implies an improper restriction of that business and a monopoly. But the language of the contract is, "to govern and control the business of master stevedores, to be carried on by its members." This is a very different thing from a combination to control the entire business of stevedoring. Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce [quoting from *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.*, 20 Ill. App. 492, *Skrainka v. Scharringhausen*, 8 Mo. App. 522].

We find nothing in the terms of the present agreement which would necessarily work an unreasonable restriction in the manner of conducting the business in question, or which would necessarily interfere with the freedom or right of others not parties to the contract to engage in and carry on such business. The parties themselves, it is true, have combined their business as severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this in itself is not an unlawful restraint of trade so long as it does not appear that the rates to be charged are unreasonable, or the restriction such as to preclude a fair competition with others engaged in the business. In *Collins v. Locke*, 4 App. Cas. 674, it is held that where the object of an agreement was to parcel out the stevedoring business of the port of Melbourne among the parties to it, and so prevent competition, at least among themselves, and reasonably keep up the price, it was not invalid, though its effect might be to create a partial restraint upon the power of the parties to exercise their trade. In *Association v. Walsh*, 2 Daly, 1, where an agreement not materially unlike the present was entered into between master stevedores, fixing a rate of prices to be charged by the members in their business, and making a penalty for any member doing work for less, and an action was brought to enforce such penalty for a default by one of the members, it was held that such an association was not

an unlawful combination, as injurious to trade or commerce, nor the restrictions unlawful, as being in restraint of trade. "An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product." Ray, *Contract, Lim.* p. 223, and cases there cited. See, also, *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.*, supra; *Skrainka v. Scharringhausen*, supra; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (U. C.) 542; *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629. In *Ontario Salt Co. v. Merchants' Salt Co.*, supra, speaking of an agreement of similar import between salt manufacturers to keep up the price of that commodity, it is said: "I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price; and nothing more than this has been agreed to by the parties here."

We find nothing necessarily inconsistent with the doctrine of these cases in the cases cited by appellants. In the case of *Factor Co. v. Adler*, 90 Cal. 117, 27 Pac. 37, the language relied upon has express reference to contracts "entered into with the object and view of controlling and necessarily suppressing the supply, and thereby enhancing the price of articles of actual necessity." In *Lumber Co. v. Hayes*, 76 Cal. 387, 393, 18 Pac. 391, 393, in the language of the court: "The very essence and mainspring of the agreement—the illegal object—'was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured.'" In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, the contract precluded the parties absolutely from shipping to, or selling the commodity within, a large part of the territory of the United States, and restricted the output of the powder within the territory wherein the parties were at liberty to sell; and it was held that the contract was void, as in restraint of trade. The cases from other states relied upon are as clearly distinguishable from the present as are the foregoing. After a careful review of all the authorities, we are unable to say from the terms of the present contract that it, to any extent, trenches upon the rule of public policy invoked, or that there is anything within its provisions which should preclude the parties thereto from enforcing it.

This conclusion renders the motion to dismiss the appeal of no consequence. The judgment is affirmed.

BAILEY v. MASTER PLUMBERS OF CITY OF MEMPHIS.

(Supreme Court of Tennessee, 1899. 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.)

CALDWELL, J. The Association of Master Plumbers of the City of Memphis sued J. A. Bailey & Co. before a justice of the peace to collect an alleged debt of \$444. On appeal to the circuit court the presiding judge tried the case without a jury, and pronounced judgment in favor of the plaintiff for the amount claimed. The defendants have appealed in error to this court, and, as they insisted below, here insist that the demand is illegal, and that they owe the plaintiff nothing. The plaintiff is a corporation chartered as a nonprofit association, under section 2, c. 142, Acts 1875 (Shannon's Code, § 2514 et seq.), and organized by a majority of the plumbers in the city of Memphis, Tenn. Numerous by-laws were adopted for the government of the association, and some of them were amended from time to time to meet the changing views of the members. One of the amended by-laws, as recited in the president's testimony, was as follows: "Each member of the association was required thereafter to report in open meeting each week what work he had done during the week, and, if it developed that such work was done in competition with any other member (such fact to be made known by the statement of such other member at the meeting at which the work was called out), the member having done the work was to pay into the treasury of the association a fixed sum, according to a schedule agreed upon and made a part of the by-law, namely, for each bath tub put in, \$7.50 was to be paid to the association; for each water-closet, a fixed sum," etc. In accordance with the plain terms of this by-law, the defendants, who were members of the association from the beginning, made weekly reports for some time, and were by the secretary charged on the books of the association with the sums fixed in the schedule for such parts of the work reported as were shown to have been done in competition with other members. The charges so made (being \$7.50 on each bath tub, \$5 on each washstand, \$5 on each water-closet, \$5 on each sewer connection, \$3 on each boiler, \$3 on each sink, \$2 on each water connection, and \$2 on each hydrant) aggregated \$444, and constituted the sole basis of this action and of the judgment below.

Since the plaintiff's demand rests upon the by-law set out above, and nothing else, the first logical step to be taken in the consideration of the case is to determine the legal effect of that by-law. Is it valid or invalid? ⁴ The tax or tariff so imposed by the association is in the nature of a penalty visited upon members who shall successfully bid against other members on work appertaining to the plumbing business; and, in the nature of things, the member, who is always conscious of the fact that he must bear that burden and pay that tribute if he gets

⁴ A part of the discussion of this question is omitted.

the job, may be expected to refrain from bidding altogether, or to indemnify himself by adding a corresponding sum to the price he would otherwise charge the customer for the same work. Though the by-law does not in terms require the member doing competitive work to increase the price he would otherwise exact of the customer, such increase is its natural tendency and effect, as would readily be supposed from its scope, and as is conclusively demonstrated by this record.⁵

Though influential in both particulars, this by-law is not shown to have reduced competition among the members of the association so much as it enhanced prices. In the latter respect it exerted a very large and most hurtful influence upon the public. The arbitrary and unreasonable enhancement in prices was rendered easy, and consequently the more widely harmful and oppressive, by the fact that most of the plumbers in the city of Memphis were members of the association, and that an imperative ordinance of the municipality, as well as the dictates of health and comfort, required all inhabitants to procure and use many of the things for whose sale and construction the association exacted the tax or tariff from its members. The provision is obviously an unreasonable restraint upon trade, and, being so, it is contrary to public policy and void under the common law. It injuriously affects matters of prime importance and legal necessity to the community at large, by the impairment of competition on the one hand, and the enhancement of prices on the other hand, and consequently no supposed obligation resting upon it is capable of enforcement in a court of justice.

The courts are practically unanimous in holding that contracts, agreements, arrangements, or combinations, in whatever form or name, are contrary to public policy and void when they tend to impair competition in trade and to enhance prices, to the injury of the public.⁶ It can avail nothing against this conclusion that the membership of the association involved in this litigation does not include all plumbers in the city of Memphis, and that the by-law in question relates alone to business done in that city. Being in restraint of trade, and injurious to the public, as heretofore shown, the by-law is contrary to public policy, illegal, and void, notwithstanding the fact that the restraint is partial in respect to the persons implicated and the territorial limits affected. It is not the number of persons participating in the by-law, or the extent of the territory included, but the injury to the public in that territory, however restricted, that characterizes the interruption of trade as illegal. *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Nester v. Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888; *Oil Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274; *Association v. Niezerowski*, *supra* (95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97).

⁵ Evidence that members added the tariff to bids given customers is set out here.

⁶ An extended review of cases is omitted.

Nor is the plaintiff's case made better by the fact that the defendants, with a view of complying with the by-law, may have wrongfully demanded and received from their customers the amount sued for. In that aspect the plaintiff and the defendants stand upon the same ground; both being wrongdoers, and neither having any just claim to relief against the other. Both being equally at fault, the condition of the defendants is the better, and they gain only because the plaintiff must lose. The plaintiff is repelled, not out of consideration for defendants, but because its action rests upon an illegal by-law, whose enforcement is forbidden by public policy. It is for the protection of the courts, and in the interest of the public rather than of the defendant, that such suits are dismissed. *Holman v. Johnson*, Cowp. 341; *Nester v. Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102; *Association v. Niezerowski*, *supra*.⁷

COTE v. MURPHY.

(Supreme Court of Pennsylvania, 1894. 159 Pa. 426, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686.)

[The facts and a part of the opinion in this case are printed ante, p. 569.]

DEAN, J. We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. *Gibson, J.*, in *Com. v. Carlisle*, *Brightly*, N. P. 40, says: "Where the act is lawful for the individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." In the same case it is held: "A combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal."

This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant

⁷ A part of the remainder of this opinion is printed ante, p. 525.

qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices, whereby the public suffers. A combination of stockbrokers, to corner a stock; of farmers to raise the price of grain; of manufacturers, to raise the price of their product; of employers, to reduce the price of labor; of workmen, to raise the price—were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages—often was not—and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed.

It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: The moment the Legislature relieves one, and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what, otherwise, they would consider fair wages. Supply and demand consist in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy, in this class of cases.

But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work,

and agree not to work until the demand is conceded. Further, they agree, by lawful means, to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do; and, so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply.

The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price. "The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com. v. Carlisle*, *supra*—that it would not be unlawful if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt, by lawful, artificial means on part of the workmen, to control the supply of labor, preparatory to a demand for an advance. Nor does the fact that the appellee was not a workman, nor a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, to aid the cause of the workmen. His right so to do was unquestionable. But if the employers, by a lawful combination, could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

But without regard to whether the general rule be settled by weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because (1) it was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; (2) the methods adopted to further the objects of the combination were not unlawful.⁸

STATE v. DULUTH BOARD OF TRADE.

(Supreme Court of Minnesota, 1909. 107 Minn. 506, 121 N. W. 395, 23 L. R. A. [N. S.] 1260.)

In this proceeding the state seeks to forfeit the corporate franchise of the Duluth Board of Trade, and to restrain it and its officers from further transacting business under the present rules on the ground that they violate the anti-trust statute of the state. The appeal is by the state from a judgment in favor of the defendants, and the record presents the question whether the conclusions of law are justified by the findings of fact. The facts stand conceded. It appears that the Duluth Board of Trade was incorporated January 31, 1881, under chapter 20, p. 35, Gen. Laws 1868, and now has and exercises the powers conferred by Gen. St. 1894, §§ 2982-2984, inclusive.⁹

The city of Duluth is one of the important terminal grain markets in the Northwest, and in the immediate vicinity thereof are found elevators, flour mills, and proper equipment for handling and marketing grain and other farm products. The Board of Trade does not buy, sell, or in any way deal in grain. Not more than 20 per cent. of those holding membership in the board are engaged in the grain or milling business at Duluth. Some are engaged in banking, marine insurance, and vessel agency business at Duluth, while others are engaged in the grain and other business outside of Duluth. The board merely furnishes facilities and conveniences for the transaction of the grain business, and to that end procures for its members information as to crop conditions and the grain markets of the world. It owns a building, of the value of \$500,000, in which there is an exchange room, where actual trades are made and posted, and where grain is bought and sold. Persons engaged in the grain commission business, and others connected with vessel agencies and marine insurance, have their offices in this building. Two classes of commission men—those who sell for the owner grain coming into Duluth, and those who buy for the consumer at Duluth or Superior, or for transportation to lower lake ports or for foreign exchange—transact business on the floor of the Board of Trade. Practically all the grain

⁸ This part of the opinion has been abridged, principally by the omission of the review and citation of cases.

⁹ Here and elsewhere the statement of facts has been shortened by unimportant omissions. Large parts of the opinion have been omitted.

bought and sold at Duluth is bought and sold on the Board of Trade, although some little grain, used for local consumption, is handled elsewhere.

The memberships in the Board of Trade, which originally cost \$1,000 each, have all been disposed of, and are now held by various individuals. They are subject to sale, and the owners may become members of the Board of Trade upon certain terms and conditions prescribed by the board. * * * Rule 27 of the Board of Trade provides that regular sessions shall be held from 9:30 a. m. to 1:15 p. m. daily, except Saturday, when trading shall cease at 12 o'clock noon, and that no firm, member, or corporation shall buy or offer to buy, sell or offer to sell, any grain or seed on track, by sample or to arrive, except during such trading hours and on the floor of the exchange.

The state charges that the board and its officers have violated the anti-trust statute by adopting and enforcing what is known as "Rule 26," which is as follows:

"The following rates and commissions are deemed just and reasonable: [Here follows a list of the different types of trading on the floor of the exchange with a rate per bushel for each.]

"The minimum rate to be fixed each year during August, for one year, by a committee of three, appointed by the president. Nothing in this rule shall be so construed as to prevent any special arrangement between consignor and consignee, by which a higher rate of commission, or interest, may be charged in special cases.

"Sec. 7. Every member of the association, and every person, firm and corporation, admitted to trade, or to do business therein, who shall charge less than the regular rates of commission, and interest, established by the rules of the association. * * *

Rules, substantially like those of the Duluth Board of Trade, relating to the qualifications of members and the manner of their admission, fixing a minimum rate of commission that may be charged upon transactions for nonmembers, allowing rates and commissions between members to be arranged without restriction, providing for and charging interest upon advances, regulating the trading upon the floor of the exchange, and providing penalties by expulsion or suspension for violation of the rules, have been in force for many years in similar exchanges in New York, Philadelphia, Boston, Chicago, Minneapolis, Milwaukee, and elsewhere.

ELLIOTT, J. * * * The trial court found that the Duluth Board of Trade, as organized and conducted, is not an arrangement, conspiracy, or combination in restraint of commerce within the state; that it does not restrain, limit, interfere with, or destroy open and free competition in the purchase and sale of grain at Duluth; that competition between seller and buyer is active and free; that the board does not fix prices of grain, nor prevent nor limit competition in the purchase or sale of grain; but that the facilities which it furnishes are

in aid of the traffic in grain from the point of production to the point of consumption. * * *

In 1888 there was embodied in the organic law of the state a declaration that "any combination of persons, either as individuals or members or officers of any corporation to monopolize the markets for food products in this state, or to interfere with, or to restrict the freedom of such markets, is hereby declared to be a criminal conspiracy and shall be punished in such manner as the Legislature shall provide." Const. art. 4, § 35. In 1891 the Legislature enacted a statute denouncing as illegal all combinations to fix prices or to control the production of any commodity. Chapter 10, p. 82, Gen. Laws 1891. In 1899 the provisions of this statute were elaborated and re-enacted as chapter 359 of the General Laws of that year, which was in force when the present action was commenced. * * *

With the exception of a provision prohibiting boycotting (chapter 194, p. 269, Gen. Laws 1901), no further changes were made in the law until the adoption of the Revised Laws of 1905, in which the act of 1899 appears in substance as sections 5168 and 5169. Section 5168 provides that: "No person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade within this state, or between the people of this or of any other state or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate, the price of any article of trade, manufacture, or use, bought and sold within the state, or which limits or which tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do. Every person violating any provision of this section, or assisting in such violation, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the state prison for not less than three or more than five years."

A subsequent statute (chapter 252, p. 342, Gen. Laws 1907) makes it unlawful for persons or corporations handling grain at public warehouses in the state to enter into any combination, contract, agreement, or understanding with any other person or corporation owning or operating any other public warehouse at any railway station, whereby the amount of grain to be received or handled shall be equalized or pooled between such warehouses, or whereby the profits or earnings derived from such warehouses shall be divided or pooled or apportioned in any manner, or whereby the price to be paid for any kind of grain at such station shall be fixed or in any manner affected. * * *

It is through such organizations as the Duluth Board of Trade that the grain trade of the Northwest has been and now is largely transacted. The purposes for which such corporations may be created are

stated in the statute and in the articles of incorporation of this defendant. The primary object is to furnish facilities for the proper conduct of business. The Board of Trade itself neither buys nor sells grain. It maintains an exchange room where the representatives of buyers and sellers meet and compete, and their competition results in trades in grain. It maintains telegraphic communication with other grain markets, and furnishes and posts information as to such markets and as to crop conditions generally. It has a building, in which its members engaged in the grain trade have offices, as do others who are connected more or less directly therewith. It is not claimed that the board fixes prices at which grain is purchased and sold. It collects and publishes statistics. It makes a market, in the sense that it keeps a record of actual transactions in the buying and selling of grain, thus making a Duluth market, in the sense that there is a Chicago and Minneapolis market. These things necessarily promote, instead of restrict, the grain trade. As said by the trial court, instead of limiting competition in the purchase and sale of grain, "the facilities which it furnishes are in aid of the traffic in grain, from the point of production to the point of consumption."

The nature of the grain business seems to require peculiar and unusual facilities for its transaction. The grain is brought by the producer to local stations, where it is placed in elevators or sold to local buyers. It must then be shipped to terminal points, like Duluth or Minneapolis, to be there disposed of on the market. These great central markets are essential, not only for the preservation and storing of the grain in large quantities, but also in order that the business may be financed. At about the same time in each year great sums of money are required for this purpose, and it is stated that the banks of Minneapolis and Duluth furnish each year to the grain men from \$40,000,000 to \$50,000,000. This money, which is absolutely necessary for the moving of the crops, cannot be obtained unless the business is so organized and conducted as to minimize the risks resulting from fluctuating prices. Through these organizations the demoralization of prices of the products which constitute the basis of credits is prevented. These markets also enable parties operating elevator lines and purchasing large quantities of grain to sell for future delivery on each day substantially the amount of grain which they purchase at interior points, thus reducing the hazards of the business and enabling them to procure from financial institutions the funds necessary to move the crops. * * *

But it does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions, which are unobjectionable and necessary that business shall not completely stagnate. As said in *Hopkins v. U. S.*, 171 U. S. 593, 19 Sup. Ct. 40, 43 L. Ed. 290: "The contract condemned by the statute is one whose direct and immediate effect is a restraint of commerce.

* * * The acts * * * must have a reasonable construction, or else there would be scarcely an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce or to restrain it." The anti-trust statutes were never designed to forbid such transactions, and it has been universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition, it is under the ban of the law, whatever may have been the intention of the parties. * * *

With these general principles in mind, we proceed to the consideration of the facts of the case at bar. It is reasonably clear that the purpose to be accomplished by rule 26 is not one which is forbidden by the anti-trust statute, and also that, even though it is within the scope of the statute, it is not illegal, because it does not destroy or restrict competition in the business of producing, buying, selling, or distributing any articles dealt in by the Board of Trade or its members. The requirement with reference to the rates on money advanced by the members and that relating to the division of commissions between members do not require any particular consideration. They clearly are not violations of the statute. The state's case must rest upon the alleged illegality of that provision of the rule which requires members to charge uniform commissions for their services in making sales for their customers. The other provisions are incidental to this, and are designed to secure its observance and enforcement. The Board of Trade is a combination of men engaged in the same business who have bound themselves by contract and agreement to charge uniform rates for personal services. It is the established law of this state that a man, or any number of men, may, unless under contract obligations, or engaged in an employment which charges them with a public duty, refuse to deal with any man or class of men, and that this right may be exercised singly or in combination with others. In *Bonn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, the court said: "The right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and to make simultaneous declaration of their choice. This has repeatedly been held as to associations of workmen, and associations of men in other lines of business must be governed by the same principles." In *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433, the court said that "within proper limits it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures."

The right of laboring men to combine for the purpose of regulating their wages can no longer be seriously denied. Five years after the enactment of the Minnesota anti-trust statute this court, in *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753,

103 Am. St. Rep. 477, said: "A strike for the purpose of securing better wages or otherwise bettering the condition of the workers is not unlawful, though the result thereof is a combination between the striking employés and results indirectly in injury to others." In *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, it was held that laboring men have the right "to combine and co-operate for the protection of such ends as the increase of wages, * * * so long as they do not inflict injury upon others or oppress and crush them by excluding them from all employment unless through joining labor organizations or unions." The right to form a combination for the purpose of fixing wages is now thoroughly established, and numerous cases sustaining it will be found cited in 24 Cyc. 819. A rule of law applicable to men who work with their hands should, when no other principle of public policy contravenes, be equally applicable, when the general purpose to be accomplished is the same, to men whose work is more intellectual.

If a combination for the purpose of regulating what one class of men in the community shall receive for their personal services is valid, because not within the scope of the anti-trust statute, it cannot be that any combination for the same purpose is prohibited because of the character or description of the individuals who enter into the combination. The classification must be along the line of purposes, and not persons. In the light of the history of legislation relating to agreements and combinations to fix and regulate wages, the often-declared rule of public policy with reference thereto, the purposes for which combinations are specifically forbidden by the statute, and the fact that such combinations affect production and prices of commodities but indirectly, we are of the opinion that combinations to fix and regulate the prices which shall be charged for wages and other forms of personal service are not within the prohibitions of our statute. Labor, whether physical, intellectual, or a combination of the two, is not by any fair rule of construction an "article of trade, manufacture, or use," or an "article, commodity, or utility" which "enters into the manufacture of any article of utility," within the meaning of those words as used in the statute. Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the federal anti-trust law. * * *

In *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, it was held that neither under the common law nor the Texas anti-trust statute is it illegal to enter into a combination to establish uniform rates of insurance and of commissions to agents. The court said: "Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it.

The services of professional men are likewise indispensable in most civilized communities and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the insurance business. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public has an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same grounds. Combinations among workingmen to increase or maintain their wages by unlawful means are unlawful. 'Encouragement to workmen in their endeavors to associate themselves in organizations for their mutual benefit have settled beyond question that unemployed workmen may unite and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed. *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 508.' * * *

But, if it should be conceded that the agreement or combination effected by rule 26 is within the general scope and purpose of the anti-trust statute, it would not violate the statute because it does not create a monopoly, and its direct and necessary tendency is neither to restrain trade by preventing competition in the business of buying and selling grain on commission, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof. As already stated, the Board of Trade neither buys nor sells grain. The members act as the agents of the producers and purchasers of the grain, and the regulation of their commissions for such services can have no appreciable effect upon either the production or the price of the grain. It is a fixed charge, which must be paid, and the price which the producer obtains for the grain may be affected indirectly thereby. But the question is whether the production or price is directly or to any appreciable extent controlled or regulated by the rule which makes the charge uniform, instead of variable—definite and known, instead of uncertain and unknown. So long as the rate of commission is reasonable, as it is conceded to be in this instance, it must be for the benefit of the producer to know in advance what it will cost in commission to have his grain sold. A rule which determines the handling charges, and makes the charge the same per bushel to the farmer who ships 100 sacks and the elevator company which ships 100 cars, cannot be held to be against public policy. In fact, public policy requires that such charges shall be definite, certain, and uniform, and this seems equally true as to commissions for sales, when made under the peculiar conditions under which the grain business is conducted. A board of trade which requires its members to treat all its customers exactly alike in the matter of charges for serv-

ices no more destroys competition than does a railroad when it charges all shippers the same rate for conveying freight.

It is common knowledge that competition between commission men for the business of the producers is in fact strong, and success in getting the business depends, not upon offering to transact it for less than the uniform rate of commission, but upon the skill and facilities possessed for obtaining the highest price for the grain from the elevator and mill men who are generally the purchasers. There is no fixed price at which sales must be made. If A. can secure a cent a bushel more for B.'s grain than can C. or any other commission man, he will get the business, and the producer who has selected him to make the sale will get the benefit of his superior skill and energy. Competition of this character exists on all Boards of Trade and Chambers of Commerce, and it is inconceivable that a rule which requires all the commission men who are members of the board or chamber to charge the same rate of commission for the same service can materially affect or control either the production of grain or the price at which it sells. Of course, in a remote and indirect way, every charge and item of expense which attaches to the marketing of grain or other products affects to some extent the prices received by the producers and paid by the ultimate purchaser. But contracts and agreements for certain and uniform charges, which are for the benefit of all and operate only indirectly on production and prices, are not within the prohibitions of the statute.

The purpose and effect of this rule is not to stifle competition, but to protect the members of the board, and foster their business and trade, and prevent it from becoming demoralized to the injury of all parties, including the consumer. * * *

Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, and Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, while not exactly in point, tend to sustain the respondent's views as to the legality of this rule of the Duluth Board of Trade. The case which comes the nearest to sustaining the appellant's contention is State v. Wilson, 73 Kan. 334, 80 Pac. 639, 84 Pac. 737. That was a criminal prosecution of the defendant upon the charge of obtaining money under false pretenses, by selling cattle which he represented to be free from incumbrance when in fact they were covered by a mortgage. The defense was that the mortgage was void, because based upon a transaction which was made criminal by the Kansas anti-trust statute. The defendant offered to prove that the mortgage was given to a member of the Kansas City Live Stock Exchange, which was an association of persons engaged in buying and selling live stock for others and practically controlling that business at Kansas City; that a by-law of such association forbade a member from charging a less commission for such services than 50 cents a head; and that a part of the consideration of the notes, to secure which the mortgage was given, was a charge

for the services of the mortgagee in purchasing the cattle covered by the mortgage. This evidence was excluded, and for the error alleged to have thus been committed the defendant demanded a new trial. The statute forbade combinations of "capital, skill and acts" for various enumerated purposes, one of which was "to create or carry out restrictions in the free and full pursuit of any business authorized or permitted by the laws of this state." It was held that the Kansas City Live Stock Exchange was an illegal organization within the meaning of this section of the statute. The statute was quite specific, and may well have been designed to reach such a case; but it is not a controlling authority in favor of the appellant, under our statute, upon the facts disclosed by this record.

A somewhat extended investigation of the law and careful consideration of the facts of this case has convinced us that the Duluth Board of Trade has not violated the Minnesota statute, and that the decision of the learned trial judge was correct.

The judgment is therefore affirmed.

LANYON v. GARDEN CITY SAND CO.

(Supreme Court of Illinois, 1906. 223 Ill. 616, 79 N. E. 313, 9 L. R. A. [N. S.] 446.)

Suit by the Garden City Sand Company and others against Dick N. Lanyon and others. Decree dismissing the bill was reversed by the Appellate Court, and defendants appeal.

The Garden City Sand Company, the Hillsdale Fire Brick & Clay Company (both Illinois corporations), and Maria Warner and Jacob B. Warner, of Indianapolis, Ind., filed their joint bill in the superior court of Cook county April 4, 1903, against the Southern Fire Brick & Clay Company, also an Illinois corporation, and Dick N. Lanyon, by which they sought to enjoin the defendants from mining fire clay upon a certain tract of land in Vermilion county, Ind., and from selling the same to any parties other than the complainants at any time prior to September 10, 1909, and from making the clay into fire brick or other clay products, and for an accounting for fire clay already manufactured and sold. An amended and supplemental bill was filed September 24, 1904, alleging that on September 10, 1901, a contract was entered into in writing between Dick N. Lanyon, first party, James A. Heber and Willis S. Bonebrake, second party, the Garden City Sand Company, third party, the Hillsdale Fire Brick & Clay Company, fourth party, and J. B. Warner and Maria Warner, fifth party, which provided as follows:

The second party, James A. Heber and William S. Bonebrake, agreed to mine, grind, and operate for the first party, Dick N. Lanyon, his fire clay grinding plant located at Jonesdale Switch, Vermilion county, Ind. Said first and second parties agreed that they would deliver f. o. b.

cars at said switch first-class marketable fire clay at $77\frac{1}{2}$ cents per ton, in such quantities and at such times as the third, fourth, and fifth parties might order. The first party agreed to erect and equip a new plant at his own expense for the grinding of the clay, and the second parties were to give their individual personal attention to the operation of said plant. The first party also agreed not to operate any other fire clay grinding plant on any land that he owned or controlled in the state of Indiana, and the first and second parties agreed not to sell fire clay to any other persons than the third, fourth, and fifth parties during the time of the contract. The second, third, fourth, and fifth parties agreed to cease to operate a certain plant located at Russell Switch, Ind., but, in case the new plant could not supply the demand, the old plant at Russell Switch was to be reopened. The third, fourth, and fifth parties agreed that they would not buy fire clay produced in the state of Indiana, except such as was produced by the parties to the contract, and they would make the greatest possible effort to sell all the fire clay so produced, and would jointly order and pay for not less than an average of 40 tons for every working day during the period of the contract, for which they were to pay $77\frac{1}{2}$ cents per ton, and not enter into any combination or trust for the purpose of limiting the output of either plant. The contract was to be in full force and effect for a period of eight years, and after its execution on October 26, 1901, was filed for record in the recorder's office of Vermillion county, Ind.

The bill further alleged that Lanyon began the erection of the plant on his land at Jonesdale Switch, but that it was never completed; that on September 17, 1902, the defendant the Southern Fire Brick & Clay Company received from Lanyon and wife a warranty deed conveying about 93 acres of the lands contained in the contract, with full notice of the contract and its terms, and commenced the erection of a plant upon the same, and was subsequently notified by complainants that, if necessary, legal steps would be taken to restrain it from operating a plant or selling fire clay in violation of the terms of the contract; that on May 28, 1902, the complainants served notice on the first and second parties that more than enough time to equip the plant which was to be built by Lanyon had expired, and demanded that 40 tons per day be delivered to them, as provided in the contract; that notwithstanding the warning and notice the Southern Fire Brick & Clay Company constructed its plant and placed the product upon the open market for sale. It is further alleged that the complainants were the first persons to introduce and place upon the market fire clay of this quality, under the name of "Dome Fire Clay" as a trade-mark, and they had built up a large trade therein, and the Southern Fire Brick & Clay Company had entered the market in direct competition with the complainants, and represented that it would sell at reduced prices the same clay under the same name. The complainants further alleged that they were ready, willing, and able to accept and handle the fire clay to be fur-

nished by the contract, but that the first and second parties had failed and refused to deliver it, the prayer being for an injunction, as above stated.

The answer of the defendants admitted most of the material allegations of the bill, but denied that complainants had any interest in or lien upon the lands in controversy, and averred they had an adequate and complete remedy at law. Issue being joined, the cause was referred to a master to take the evidence and report his conclusions. On January 18, 1904, during the taking of the evidence, the defendant Lanyon notified the complainants, in writing, that he had constructed on his lands described in the contract a plant, and was ready to enter upon and carry out his part of the contract and awaited the order of the complainants.

The master, in his report, found that the bill was filed to secure the specific performance of the contract and for an injunction to restrain the violation of the negative covenants thereof; that such an action would not lie; that the injunction prayed for would not obtain fire clay for the complainants, but would merely prevent the defendants from selling the same elsewhere; also, that the complainants had an adequate remedy at law. On the coming in of that report the cause was re-referred to the same master and additional evidence taken and a second report made, in which the master found that the contract was in the form of a trust in restraint of trade, and that the sole object of the complainants' bill was, not to obtain fire clay, but to prevent the defendant company from entering the market in competition with complainants. Objections were filed to the report, which stood as exceptions, and they were overruled by the chancellor and the bill dismissed. The complainants prosecuted an appeal to the Appellate Court for the First District, where the decree of the superior court was reversed. This appeal is from that judgment of reversal.

WILKIN, J. (after stating the facts). The first question discussed in the argument of counsel is whether the agreement of September 10, 1901, * * * is in restraint of trade and violative of the anti-trust law of this state or of the United States, * * * and therefore void.¹⁰ The appellants, in support of the latter contention, insist mainly upon that part of the contract by which the first party agrees not to operate any other fire clay grinding plant on any land owned or controlled by him in the state of Indiana, or to sell to any other person during the time of the contract, and in which the third, fourth, and fifth parties agree not to buy fire clay produced in that state other than from the first and second parties. * * *

The object of these statutes is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or

¹⁰ Only so much of the opinion as relates to this point is printed, and that has been abridged somewhat.

prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But a contract may incidentally restrain competition or trade without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it. * * *

The authorities agree that contracts in partial restraint of trade, in order to be valid, must be reasonable as to time, place, terms, etc., manifesting an intention to simply protect the party relying upon the covenant in the reasonable restraint of unjust discrimination against him. Such contracts usually grow out of sales of property with the good will of a business, profession, partnership, etc., but they are not confined to such contracts. Speaking of the federal statute in the well-considered case of *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, it is said: "If it [the contract] promotes or accidentally restrains competition, while its main purpose and chief effect are to foster the trade and increase the business of those who made and operated it, then it is not a contract, combination, or conspiracy in restraint of trade within the true meaning of this act, and is not subject to its denunciation."

Are the foregoing terms of the contract of September 10, 1901, violative of the law under the rules of construction above set forth. That is, are the restrictions partial, reasonable, and calculated to foster the business rather than to destroy competition? Looking into the facts and circumstances surrounding the parties at the time the contract was entered into, we find that Lanyon, the first party, possessed a large tract of land containing fire clay in the state of Indiana which was undeveloped and produced no adequate income as compared with its capabilities. He had the money to develop it and make it productive, but was without experience in the business of dealing in the product and without means, within himself, of obtaining a market for the same. Heber and Bonebrake were experienced miners of fire clay, and in a small way engaged in the business, which, if properly extended, would make Lanyon's property valuable. The appellee corporations had for many years been engaged in selling the product and were looking for opportunities to increase their business. Naturally the several interests of these parties drew them together and prompted them to make the contract in question. It was of mutual benefit and advantage to each of them. Without it each party would labor at a disadvantage and fail to realize the full limit of his or its resources and opportunities.

The contract seems just and reasonable in the light of these facts. The corporations might reasonably refuse to enter into the contract or purchase the 40 tons of fire clay daily, unless they could be protected against the selling of the same product by Lanyon in competition with them. The contract was to run for eight years—a time not unreasonable for the development of the business entered upon. The limitation applied to only about 180 acres of land in a territory of many hundreds

of acres underlaid with the same fire clay deposits. The contract in no way sought to control the labor or experience of all or any considerable number of experienced fire clay workers. The evidence also shows that large deposits of this same fire clay are found in localities outside of the state of Indiana, i. e., in Illinois, Ohio, Pennsylvania, and perhaps other states. Considering the contract as a whole, in the light of the facts surrounding the parties, we are of the opinion that it is not invalid, that the object of it was to foster and establish a legitimate business, and, although to a limited extent it may have restrained competition, there was not such a limitation or restriction as should defeat its validity under the law. * * *

We find no reversible error, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

UNITED STATES v. WINSLOW.

(Supreme Court of the United States, 1913. 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481.)

In error to the District Court of the United States for the District of Massachusetts to review a judgment sustaining a demurrer to certain counts in an indictment charging violations of the Sherman Anti-Trust Act.

See same case below, 195 Fed. 578.

Mr. Justice HOLMES delivered the opinion of the court.

This is a writ of error to determine whether two counts in an indictment, as construed by the district court, charge offenses under the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3200. They were held bad, on demurrer, by the District Court, 195 Fed. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second, as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines, and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines, of course, are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants Winslow, Hurd, and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made 60 per cent. of all the lasting machines made in the United States; the defendants Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner made

80 per cent. of all the welt-sewing machines and outsole-stitching machines, and 10 per cent. of all the lasting machines; and the defendant Storrow (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made 70 per cent. of all the heeling machines and 80 per cent. of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the states with such of the shoe manufacturers as are outside Massachusetts, the state where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company, and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the states that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned, furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the states; to enhance the value of the same at the expense of the public; and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman Act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The District Court construed the indictment as confined to the combination of February 7; that, is, simply to the merger of the companies, without regard to the leases subsequently made (195 Fed. 592, 594); and we have no jurisdiction to review this interpretation of the indictment. *United States v. Patten*, January 6, 1913, 226 U. S. 525, 57 L. Ed. 333, 33 Sup. Ct. 141. Hence the only question before us is whether that combination, taken by itself, was within the penalties of the Sherman Act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case.

Thus, limited, the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that com-

bined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, Paper Bag Patent Case (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*) 210 U. S. 405, 429, 52 L. Ed. 1122, 1132, 28 Sup. Ct. 748, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below (195 Fed. 591) and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from 70 to 80 per cent. of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent. of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue v. Creamery Package Mfg. Co.* Jan. 20, 1913 [227 U. S. 8, 57 L. Ed. 393, 33 Sup. Ct. 202]; *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518, 524, 25 Sup. Ct. 276.¹¹

Judgment affirmed.

WAYNE-MONROE TELEPHONE CO. v. ONTARIO TELEPHONE CO.

(Supreme Court of New York, Special Term, 1908. 60 Misc. Rep. 435, 112 N. Y. Supp. 424.)

SUTHERLAND, J. This action is brought to procure a judgment for the specific performance of a contract made between the plaintiff and the defendant Ontario Telephone Company April 14, 1904, and for damages for the breach thereof. The complaint states in substance that at the time the contract was made the plaintiff was a domestic corporation, engaged in the operation of a telephone system in the county of Wayne, having its principal office at Williamson, in that county, and the defendant Ontario Telephone Company, a similar corporation, was engaged in the operation of a system of telephones

¹¹ A part of the opinion relating to appellate practice is omitted.

in Oswego county, and had its principal office at the city of Oswego. The contract referred to recited the fact that the Wayne-Monroe Company had western connections with Rochester, Buffalo, and intermediate points, and desired to extend its service eastward, and that the Ontario Company had connections east and south of Oswego, but desired to extend its service westward; and it was accordingly agreed that the Ontario Company should build a line westward to Fair Haven, in Cayuga county, and that the Wayne-Monroe Company should build a similar line eastward to Fair Haven, at which point a connection was to be made between the wires of the two companies, and it was agreed that on the making of such connection the lines of both companies should be so operated that service should be given from all points located on the lines of one to all points on the lines of the other company, and the proportion of the tolls to be received by each company for messages passing over the connected lines was either fixed by the contract or left to be adjusted thereafter. Each party agreed to furnish the other first-class service. The life of the contract was to be for five years; and thereafter until one year's written notice should be given by either party to the other of its intention to terminate the contract. The eighth and eleventh clauses provide as follows:

"Eighth. First party agrees not to compete with second party in telephone business, nor to compete with or take subscribers in territory occupied by exchanges or companies with which second party connects or has contract relations, except upon written consent of second party; and second party agrees not to compete with first party in telephone business, nor to compete with or take subscribers in territory occupied by exchanges or companies with which first party connects or has contract relations, except upon written consent of first party."

"Eleventh. The said parties hereto agree not to enter into any contract with any other person, firm, or corporation, whereby any of the privileges and advantages herein acquired by either party may be impaired."

Immediately on the execution of the contract the plaintiff and the Ontario Company extended their respective lines and formed a connection at Fair Haven, and the plaintiff's business was materially increased as the result of the through toll service to the eastward which the agreement made it possible for the plaintiff to give to its patrons; but in July, 1906, the Ontario Company severed its connections at Fair Haven and refused to further carry out the contract. The plaintiff claims that great and irreparable injury is sustained by it through the loss of the traffic arrangement with the Ontario Company, and brought this action for a specific performance of the contract and for damages. When the action came to trial, it transpired that since the commencement of the action the stock of the Ontario Company had been purchased by the Empire State Telephone & Telegraph Company,

and a merger of the Ontario Company with the Empire State Company had been effected, and that the latter company was in possession of the plant of the Ontario Company, and was the only corporation which could, in fact, perform the agreement on behalf of the Ontario Company, whereupon an order was made that the Empire State Company be made a party to the action. A supplemental summons and complaint were served, and both defendants now demur to the supplemental complaint on the ground that it does not state facts constituting a cause of action; and their main contention is that the contract is obnoxious to public policy and contrary to the statutes of the state, being in restraint of trade and tending to create a monopoly, and that therefore specific performance should not be decreed, nor damages awarded for the breach thereof. Clauses 8 and 11, which have been quoted above, are attacked by counsel for the defendants as illegal in this respect, and it is claimed these clauses cannot be severed from the rest of the contract, and that the whole agreement must fall to the ground.

This demurrer cannot be sustained unless it appears from the face of the complaint that the entire contract is void because it unlawfully restrains trade or tends to create a monopoly. In my opinion the complaint does not show the contract to be of such a nature. The original parties to the agreement were not rivals. The complaint shows they were occupying different territory. Neither company withdrew from any portion of its field of operations, nor discontinued any service it was rendering to the public. The connection at Fair Haven gave each company an opportunity to enlarge its business, affording to the Oswego Company western connections which it did not have, and the Wayne-Monroe Company eastward and southern connections which it desired, but did not possess. The Wayne-Monroe Company was not the only telephone company doing business in its territory. The Oswego Company was not the only telephone company in its original field. Neither company had a monopoly in the field which it occupied, nor had the two companies a monopoly of long-distance business after the connection was made. Instead of creating a monopoly, a new long-distance telephone system was instituted by the connection of these two separated local systems, thereby affording the public the benefit to be derived from competition in long-distance business. Viewing the contract as it stood before the intervention of the Empire State Telephone & Telegraph Company, it would appear primarily to be not for the purpose of restraining trade, but for its extension and for the public welfare and convenience.

The agreement does restrain each party from becoming a business rival of the other during the life of the contract; but that restraint is only incidental and contributory to the attainment of the main object of the agreement, namely, an extension of the business of each party through the connection of their two systems. Clauses 8 and 11 only afford to each the security which is reasonable and necessary for the

faithful performance of the obligations of agency assumed by the other, and to protect each against the improper use of the knowledge and instrumentalities placed in the hands of the other by virtue of the contract. Such a partial and minor restraint of trade, remote in application and agreed to in order to bring about an immediate and relatively larger extension of trade in other respects, with an improvement of facilities for the public convenience, is not condemned by the statutes nor by the common law, as now interpreted and applied by the courts.

It will not be profitable to enter upon an extended citation of the authorities upon this subject. It will suffice to refer to the illuminating discussion contained in the opinion of Judge Taft, writing for the Circuit Court of Appeals in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122.¹²

It will be readily seen that the same reason, by force of which the law permits partners, and principals and agents, and other persons sustaining confidential relations to each other, to covenant mutually against a competition in business for the protection of the main object of the agreement of partnership, or agreement of agency, and to prevent the unjust use by one party of the knowledge acquired by the confidential relation thus established, applies with equal force to the traffic arrangement made between these telephone companies. The connection of their lines was certainly for the public welfare, and it was reasonable for them, under the circumstances, to protect themselves from the injury which would result by the use of the instrumentalities and opportunities afforded by the contract for the promotion of a rivalry in business in a manner which never would have been possible but for the agreement to connect their lines. Indeed, under the conditions presented, it would seem to be incompatible with the agency which each assumed toward the other for the transmission of messages that the agent should establish competing lines and seek customers in the same territory in which the other receives its patronage. The tendency would be not to perform the duties of the agency with as great fidelity if the agent had a selfish end to attain in the undermining of the business of its principal. The covenant not to become a competitor in the field already occupied by the other would seem, therefore, to be a reasonable corollary to the creation of this reciprocal agency, and quite essential to its complete and successful fulfillment.

I am not unmindful that the courts must look with keen scrutiny into contracts between corporations holding franchises from the public, exercising the power of eminent domain, and rendering service upon which the public necessarily depends, which tend in any degree to deprive the public of the benefits of competition; but contracts between public service corporations, which involve incidentally a partial restraint in competition, are not obnoxious to public policy, if the

¹² A review of this case is omitted.

main object of the agreement is lawful and beneficial to the public, and the restraint upon competition imposed is only a minor incident and fairly necessary for the accomplishment of the principal object to be attained. *Chicago R. R. Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. Common carriers are not deprived of the benefit of such contracts. *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. 64, 22 L. Ed. 315; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

The Empire State Company succeeds only to the rights and liabilities of the Ontario Company under the contract. If the contract was good between the parties who entered into it, it cannot become wholly void by the purchase of the lines and properties of one of the parties by a third telephone company, whose more extended field of operation may make the third company an actual rival of the remaining original party to the agreement. Accordingly it is held, in conformity to the views expressed, that the complaint states a cause of action.

The demurrers must therefore be overruled.

UNITED STATES TELEPHONE CO v. CENTRAL UNION TELEPHONE CO.

(Circuit Court of Appeals of the United States, 1913. 202 Fed. 66, 122 C. C. A. 86.)

Suit in equity by the United States Telephone Company against the Central Union Telephone Company and another. From a decree dismissing the bill (171 Fed. 130), complainant appeals. Affirmed.

During the period prior to 1898, the Central Union Telephone Company had established a system of long-distance telephone communication extending over large parts of the states of Ohio and Indiana. It also owned and controlled local telephone exchanges in many cities and villages in this territory. The American Telephone & Telegraph Company, by license or stock ownership or otherwise, controlled the Central Union, so that the latter, with its local exchanges and long-distance lines, became allied to, and in a sense a part of, the so-called Bell System, extending throughout the United States. At the same time there also existed, in the two states named, a large number of so-called independent local telephone exchanges, often operating a local exchange in direct competition with the local exchange of the Central Union, at the same place, but not amounting to a completely competing system, because the independent local exchanges were not generally connected with each other by long-distance lines, and hence could not give to their local patrons long-distance service. It was the established practice and rule of the Central Union not to permit its long-distance lines to be used by or for the local independent exchanges, and it thus promoted its own

local business by offering in connection therewith long-distance service which local competitors could not give. The bill alleges, and it is now to be taken as true, that this conduct and policy of the Central Union Company were intended for, and were effective toward, unfairly suppressing competition and oppressively establishing a monopoly in the telephone business.

In this situation the United States Telephone Company was organized as an independent long-distance company, for the purpose of furnishing long-distance service to the independent exchanges in the two states named and adjacent territory. It proceeded to, and did, expend several million dollars in the construction of such lines, and in connection with this planning and development it negotiated and made contracts with a large number of independent local exchanges in Ohio, Indiana, and Michigan, which contracts provided for an interchange of business, "so that a comprehensive and adequate independent telephone system was thereby created." This independent system thereupon entered into and carried on a general telephone business, competing with the Bell system in the territory named, and in about 1907, it had been so successful that it was furnishing long-distance service for 800 independent exchanges, 2,000 independent stations, and 700,000 telephones. Up to the time last named the Central Union Company had adhered to its policy of refusing to furnish service to independent exchanges, but at about that time it abandoned that policy, in whole or in part, and began to solicit an exchange of business with the local independent companies; in other words, the Central Union Company entered into active competition with the United States Company for the long-distance business of the independent local exchanges. The contracts above named, between these exchanges and the United States Company, provided that, for points reached by that company, they should give their long-distance business exclusively to that company and receive long-distance business from that company alone, so that this new policy of the Central Union Company amounted to soliciting the independent exchanges to break their contracts with the United States Company. Several independent exchanges accepted the offers made by the Central Union Company, and entered into interchange arrangements with it.

Against two or three of such independent local exchanges, the United States Company filed injunction complaints, and obtained injunctions in the common pleas court of Ohio. The Central Union Company continuing such solicitation, the United States Company filed this bill in the United States Circuit Court for the Northern District of Ohio, asking an injunction against the continuance of such acts. The defendants demurred, and the Circuit Court dismissed the bill. The United States Company appealed to this court. The hearing of the appeal was long delayed, awaiting the decision of the Supreme Court of Ohio; but that decision, when rendered, was not

controlling, as hereafter explained,¹³ and accordingly the appeal has been argued and submitted to this court.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). * * * The court below based its conclusion largely upon the ground that the exclusive feature of the contracts between the independent locals and complainant was in itself unlawful and void, as tending to unlawful trade monopoly. If that court was right in this, all the other questions argued become immaterial, and so that question is naturally the first to be considered. This necessitates a more careful statement of this feature of the contracts.

Taking one of the contracts as typical, we find that the long-distance company (complainant) agrees to build a line to the corporate limits of the village, and thence upon the poles of the local company to its central exchange in the village, receiving a license to use therefor the poles of the local company's village lines; that service will be given from all lines owned, controlled, or connected with the lines of either party over the lines of the other party and its connections; that neither party will enter into contract with any other person or corporation whereby any of the rights, privileges, or advantages acquired by this contract might be impaired; that the long-distance company will transmit, over the lines owned or controlled by the local company, all messages destined to points thereon, and not reached by the long-distance company's own lines; that the local company will transmit over the lines of the long-distance company all messages to points "not now reached" by the local company's own lines (as shown by the attached plat of existing local lines); that the tolls and charges shall be divided in agreed proportions; and that the contract shall remain in force for 99 years.

Speaking generally, the policies of the state of Ohio, and of the United States, regarding restrictions of competition, are the same; if there are differences, they are immaterial here.¹⁴ It also seems clear, and is not denied, that the carrying on of telephone business is trade and commerce within the proper meaning of those terms, and one of the kinds of business in which it is the general purpose of the law that all citizens should be at liberty to engage on equal terms.

With these premises, the prima facie restrictive character and monopolistic tendency of the contracts in question can hardly be denied. The local company has tied up its long-distance business. It cannot take general advantage of competition from time to time arising, no matter how advantageous to it or its patrons, and it cannot expand its own business and extend its own lines beyond its then existing limits into competition with the long-distance company, no

¹³ So much of the case as relates to this point is omitted.

¹⁴ A discussion of this question is omitted.

matter how advisable such extension and competition might prove to be. This is from the standpoint of the local exchange, but similar results are apparent from the other standpoint. The long-distance company not only forestalls competition likely to arise through the extension of the local company's lines, but by its system of these contracts there was a direct plan and effort to monopolize in the long-distance business so much of the field as it could cover. A general system of contracts may be obnoxious to an anti-trust law, though the individual contract would not be. *United States v. Reading Ry.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243. These contracts, therefore, must be condemned because "adopted for and adapted to"¹⁵ restraint of trade and monopoly, unless they escape that condemnation for the reasons hereafter to be considered.

Another consideration leads to the same result: These local exchanges, organized under the Ohio statutes, were public service corporations bound to give reasonably adequate service. *Cumberland, etc., Co. v. Kelly* (C. C. A. 6) 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; *Postal Co. v. Cumberland Co.* (C. C.) 177 Fed. 726. It is true that they were not charged with an express duty to give long-distance telephone service, but neither were they confined to strictly local service. They had power to extend their lines whenever and wherever the needs of the service and good business policy might dictate (section 3455, R. S. Ohio), and their obligation to furnish reasonably adequate service is not confined to such exact definition of that term as might have been given at the time of the organization. Every such charter contemplates that conditions will change from year to year and from decade to decade, and that the obligation of the company shall be to give that service, which, at the future time when the question arises, is then, and in view of the conditions then existing, reasonably adequate. It is now a matter of common knowledge that long-distance communication is a practical necessity to the perfection of the service rendered by a local exchange to its subscriber, and this situation, while not as clear and certain in 1900 as it is in 1912, must be deemed to have been then within the contemplation of the parties and of the law.

A long-distance telephone service is not necessarily reasonably adequate just because it reaches the city or district of residence of the person with whom communication is desired. A railroad service may be beyond criticism if all passengers and freight are delivered at one station in a city, from which station the passengers go their several ways, and to which station consignees come for their freight; a telegraph service may be complete if the messages reach over the wire only one central office, from which they are distributed by other means; but in telephone communication the ultimate thing sought is

¹⁵ "Judge Knappen's phrase in *Bigelow v. Calumet & Hecla Co.* (C. C.) 155 Fed. 869, 875" *The Federal Reporter*.

personal conversation, and a long-distance telephone service has not reached its full usefulness until the user, in one place, can talk directly with the residence or place of business of the telephone users in another place. It is not now important where the line will be drawn in determining what is reasonably adequate service. That will depend upon many conditions, some of which cannot be foreseen. It is enough to say that where a local telephone company contracts that it will not send or receive any long-distance messages, excepting in co-operation with one specified long-distance company, it thereby abdicates its power to give a service which may turn out to be clearly within any proper definition of "reasonably adequate."

Nor are we concerned with the question whether the local exchange could, in 1900, have been compelled, or might now be compelled, to give this long-distance service against its will. We consider only the fact that by these contracts the local companies partially disabled themselves from performing what might become a portion of their public duties, and hence, for that reason also—and unless the controlling justification appears—the contracts are invalid.

We come, then, to the inquiry whether there is sufficient reason for exempting these contracts from their *prima facie* invalidity; and the first point urged to this effect is that, by statute, the long-distance company and the local company each had power to purchase and consolidate with the other, and that, as the greater includes the less, this power of consolidation necessarily implies the power to contract for exclusive, mutual relations. The statutes did give this power of purchase or consolidation (section 3455, *supra*); but such general powers must be construed as subordinate, not paramount, to specific prohibitions of monopolistic combination (*Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679). Nor does the power to consolidate or combine with another company reach to a system of identical or similar contracts with hundreds of other companies, resulting in a general combination. The essential evil may be in the system, but not in the single contract.¹⁶

It will be noticed that these exclusive contracts have the effect, not only to require the local company to give its long-distance business to the United States Company as against any long-distance competitor like the Central Union, but also to prohibit the local company from extending its own lines in competition with the United States Company. As will be seen from the statute cited, it had the charter power to extend its own lines wherever the good of its stockholders and the benefit to the public might, from time to time, dictate. So far as such extensions might compete with the lines of the United States Company, then or thereafter established, this power of extension was, by the contracts, abrogated. This consideration adds force to the extract just quoted from Judge Tayler's opinion.

¹⁶ A quotation from the opinion below is omitted.

It is next urged that these contracts should be approved because, in spite of their restrictive and monopolistic tendencies, their net character tended in the contrary direction, so that they really promoted, instead of restraining, competition. This is because, in 1900, the long-distance field, so far as occupied at all, was exclusively held by the Central Union Company, which (the demurrer admits) was a monopoly maintaining its position by unlawful means, and because it was impossible to promote and establish a competing long-distance system unless that system was in advance assured of business from independent exchanges, which assurance could be had only by exclusive contracts. We consider this argument as depending upon the principles which have been most recently discussed by Mr. Justice Lurton, in the Reading Case (*supra*) with reference to the 65 per cent. contracts, and it amounts to saying that the restraint and monopoly found in these telephone contracts were not their main and characterizing purpose and effect, but were the indirect and necessary incidents of contracts which operated primarily for promoting competition—hence, they cannot be condemned. It may well be that if a system of monopoly is found so entrenched that competition cannot get a start, except by providing itself in advance with a system of exclusive contracts, then, in such case and in so far as this is necessary to get competition, the exclusive contracts may become a mere incident of the generally lawful enterprise. However, it is clear that this exemption cannot go beyond the necessity of the case, and the bill in this case indicates no necessity requiring or justifying 99-year contracts. These are practically perpetual contracts. Within that period, the entire subject-matter might, and very likely would, change its essential character over and over again. We cannot undertake to suggest the term of exclusive contract which would be reasonable, so as to permit the use of such a means for getting a rival company into the field. The term of a patent may furnish some analogy. Different circumstances may justify different terms. The term might be such as to make it very difficult to decide upon which side of the line it lay. We need not speculate about these things, because we are clear that the 99-year restriction found in these contracts goes far beyond any inherent necessity for the purpose suggested, and so cannot be justified as properly incidental to a lawful purpose.

Several other reasons are urged for sustaining the validity of these contracts in spite of what we have called their *prima facie* invalidity, but we find none of these reasons as forceful as the two which we have discussed; nor does any one of the decisions which have been pressed upon us seem persuasive in opposition to the conclusions we have expressed. A review of these cases would be unprofitable. No one of them has reference to a system of hundreds of identical or similar contracts covering large parts of three states, running for a period of time which is practically perpetual, and operating to abrogate a

part of the powers of public service corporations, and covenanting that the powers not wholly abrogated shall not be exercised as they might otherwise have been and as may prove to be essential to giving good service and to avoiding monopoly. For example, in *Chicago, etc., Co. v. Pullman, etc., Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, a contract by the railroad to give to the Pullman Company the exclusive right to furnish sleeping cars to the railroad was sustained; but the contract was for a period of only 15 years, and contained an option by which, if unsatisfactory, it might be terminated in 5 years.

Such a contract was, essentially, of a different character from those now involved, because of the entire practicability of exchanging long-distance telephone business with more than one company, contrasted with the practical difficulties which might attend the attempted use of the same railroad track for sleeping cars of different systems; but, aside from this practical distinction, the opinion does not indicate to us that the exclusive sleeping car contract would have been sustained if it had been for the period of 99 years, and if it had been one of a system of similar contracts covering or attempting to cover all the railroads in a large territory. The Supreme Court has also sustained exclusive contracts for hauling express cars (*St. Louis, etc., Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791); but this is less analogous than the Pullman Case. On the other hand, the view we take is supported, more or less perfectly, by *Beasley v. Texas Pac. Ry. Co.*, 191 U. S. 492, 497, 24 Sup. Ct. 164, 48 L. Ed. 274; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *South Chicago, etc., Co. v. Calumet, etc., Co.*, 171 Ill. 391, 49 N. E. 576; *Central, etc., Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

We are not unmindful that the result of affirming the decree below is to compel what is said to be the weaker of the two companies to defend itself against commercial aggression from the stronger by some other means than merely standing upon these contracts which it had provided for such defense; but, in applying rules of this kind, we must look to the future as well as to the present. Sustaining these contracts might, for the time being, aid the weaker and so help to maintain competition; but it would at the same time point the way by which, in case of the voluntary or involuntary combination of these two companies, all competition or possibility of competition would be, for 99 years, excluded. This entire phase of the question is so well stated by Judge Tayler that we quote with approval this part of his opinion [below]:

"The position which counsel for complainant take comes to this when we analyze it: The Bell Telephone Company is a wicked monopoly. Some years ago the United States Company concluded

to fight it. The only way to fight the devil was with fire. The only way to fight the monopoly was to monopolize all unoccupied territory. The way to monopolize this unoccupied territory was to go to a local telephone company which had no long-distance connection and offer to give it such a long-distance connection, provided a perpetual monopoly of it was given in return.

"This purpose to destroy the Bell monopoly may be admitted to be virtuous. The method resorted to was vicious. It was a mere repetition and imitation of the methods which, when followed by the Bell Company, are so bitterly denounced. The philosophy that the end justifies the means, when the end is virtuous and the means vicious, has long since been discarded, if it ever had any avowed supporters. But even that philosophy cannot apply to a mere business undertaking. The purpose to destroy the telephone monopoly was not a virtuous purpose; it was a business proposition, which incidentally led, we may assume, to a righteous result. What becomes of the righteous result when the means to accomplish it are the means of unrighteousness? The ultimate result of which may be that we discover we have exchanged one master for another, or if not, that we have emphasized the strength of the former master. Counsel, of course, will not deny that if the Bell Company should acquire control of the complainant, these contracts would be just as valid and the shield of our defense would be turned into a weapon with which to destroy us.

"Are the courts to turn themselves into inquisitors of the minds of men and say: 'Here is a man who wants to do the world some good? The ultimate result promises to be beneficial, but, in order to accomplish it, he must monopolize the business of some community and must violate the law. May he do so?' These questions were long ago answered, and yet they come up again and again.

"The sum of all this is that it does no good to destroy one monopoly by creating another. Monopolies all look alike to the law. When they use their power unlawfully, it is for the law to take suitable steps to punish the offender and prevent recurrence of the offense."

The decree below is affirmed, with costs.

UNITED STATES v. PACIFIC & ARCTIC RAILWAY & NAVIGATION CO.

(Supreme Court of the United States, 1913. 228 U. S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742.)

Indictment for alleged violations of the Sherman Anti-Trust Act and of the Interstate Commerce Act.

The indictment contains six counts. The first and second counts charge violations of the Anti-Trust Law.¹⁷ * * *

¹⁷ Much of the statement of facts and part of the opinion are omitted.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the Interstate Commerce Act. The discrimination is charged to have been practised against the Humboldt Steamship Company between January 1, 1909, and August 10, 1910. * * *

Count 4 is the same, as to the facts alleged, as the third count, except the discrimination is charged to have been practiced against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the sixth. To that, the demurrer of the individual defendants was sustained.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court. * * *

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver, (southern ports) to Skagway (the entire wharfage facilities being owned by the North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon river; (3) thence by boat down the Yukon river to Dawson, etc. (called the northern ports). The route is designated as the White Pass & Yukon Route, and is constituted of (a) the Pacific & Arctic Railway & Navigation Company, a West Virginia corporation; (b) the British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) the British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) the British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company," and own the only line of transportation between the wharf at Skagway and the Yukon river.

By mutual agreement between the defendant steamship companies, the Wharves Company, and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

By agreement between the defendants, the railroad refused to make any through route or joint rates with the Humboldt Company, or with any of the independent steamship lines, and refused to bill freight or passengers from the United States to Yukon river points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon river points, which rates were very much higher than the railroad's pro rata of the through rate.

The Wharves Company charged \$2 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into, a contract to have all of his shipments so carried, the wharfage charge was only \$1. Wharfage charges in excess of \$1 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4, and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The defendant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway, and the railroad from Skagway to the Yukon river points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad company establishing through route and joint rates with them, and refusing to do so with the Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges, and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective, and cut out the Humboldt line and the independent lines as factors in the routes

of transportation between the United States and the Yukon river points. Is the scheme illegal?

This is asserted by the government and denied by the defendants. The court below, if we take some parts of its decisions, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the Anti-Trust Act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that, in order to constitute restraint of trade or monopolization of trade under the Anti-Trust Act, the acts charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through-route agreements by a common carrier with one or more connecting carriers, and the refusal to make such agreements with other connecting carriers, was not unlawful either at common law or by the Interstate Commerce Act; and the court held, therefore, that such act did not constitute restraint within the meaning of the anti-trust act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed.

But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska, and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-Trust Law—of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518, 524, 25 Sup. Ct. 276.

We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by *Swift & Co. v. United States*, *supra*, and *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercised by the Anti-Trust Act. In those cases, as here, the purpose (the means being different) was the prevention or destruction of com-

petition, and the agreements here are exactly adapted to the purpose. Not the railroad only, but the Wharves Company as well, is charged to be in the combination. It was intermediate the railroad and the steamship lines, and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination; and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether \$2 per ton (the rate charged to independent lines, as against \$1 per ton, charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important, and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co. v. United States*, supra), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the Anti-Trust Act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that, as part of the transportation route was outside of the United States, the Anti-Trust Law does not apply.¹⁸

The ruling of the District Court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the District Court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The government attacks the conclusion with arguments of great strength, and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the Interstate Commerce Act, but gives the Commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions.¹⁹

The contentions of the government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a crimi-

¹⁸ So much of the opinion as relates to this question is omitted.

¹⁹ A further statement of the government's position is omitted.

nal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to wit: *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 427, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075, and *Baltimore & O. R. Co. v. United States*, 215 U. S. 492, 54 L. Ed. 296, 30 Sup. Ct. 164. And it would, in our judgment, be an erroneous view to take that the great problems which the act was intended to solve, and the great purposes it was intended to effect, should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers, and carriers, and their respective rights and obligations dependent upon the act, has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The District Court sustained count 6 against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment, and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment, and that the court would have undoubtedly so ruled but for its construction of the Anti-Trust Act; and it is also urged that in case of reversal of the court's decision upon the construction of the act, it be permitted to pass upon such of the grounds of demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the District Court be reversed, with instructions "to pass on the sufficiency of the indictment without regard to the action or nonaction of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2, and the case remanded with instructions to proceed in accordance with this opinion.

BOARD OF TRADE OF CITY OF CHICAGO v.
UNITED STATES.

(Supreme Court of the United States, 1918. 246 U. S. 231, 38 Sup. Ct. 242, 62 L. Ed. 683, Ann. Cas. 1918D, 1207.)

Mr. Justice BRANDEIS delivered the opinion of the court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. Its 1600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified.

On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 a. m. to 1:15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the session or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9:30 a. m. on the next business day.

In 1906 the Board adopted what is known as the "call" rule. By it members were prohibited from purchasing or offering to purchase,

during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois, this suit against the Board and its executive officers and directors, to enjoin the enforcement of the call rule, alleging it to be in violation of the Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209. The defendants admitted the adoption and enforcement of the call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "call" rule; and enjoined them from acting upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District Judge. The government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to any one. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the re-

straint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First. The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a. m. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second. The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from any one at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from nonmembers anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third. The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(b) It brought into the regular market hours of the Board sessions, more of the trading in grain "to arrive."

(c) It brought buyers and sellers into more direct relations; because on the call they gathered together for a free and open interchange of bids and offers.

(d) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(e) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

(g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(h) It enabled those grain merchants of Chicago who sell to millers and exporters, to trade on a smaller margin and by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(i) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

FRED HEIM BREWING CO. v. BELINDER.

(Court of Appeals at Kansas City, Missouri, 1903. 97 Mo. App. 64, 71 S. W. 691.)

ELLISON, J. The plaintiff is a corporation engaged in the manufacture of beer, and defendant was a customer of the plaintiff. This suit is on an account for beer sold to defendant, and plaintiff prevailed in the trial court. The principal point made here for reversal is based upon chapter 143 of the statute in relation to pools, trusts, and conspiracies. It is provided in said statute (section 8965) that: "Any corporation, partnership or individual who shall become a member of any pool, trust or combination to fix the price of any article of merchandise, or to limit the amount or quantity of any article of manufacture, shall be guilty of conspiracy to defraud." And (section 8966) that: "All contracts or combinations designed with a view to lessen, or which tend to lessen, full and free competition in the importation, manufacture or sale of any article or product in this state, and all contracts and combinations whereby it is proposed that any person doing business in this state shall deal in or sell any particular article and shall not during the continuance of such combination deal in or sell any competing article, are hereby declared to be against public policy, unlawful and void, and the parties thereto shall be adjudged guilty of a conspiracy to defraud." And (section 8970) that: "Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this article shall not be liable for the price or payment of such article or commodity, and may plead this article as a defense to any suit for such price or payment."

The only evidence which we need consider was that given by plaintiff's chief officer, and that was that plaintiff and the other brewery corporations of Kansas City had an understanding and agreement that they would not sell to any one who was in debt for beer to either of the others until he paid that debt. The statute aforesaid (section 8966) denounces any agreement, arrangement, or combination made with a view to lessen, or which tends to lessen, full and free competition in the importation, manufacture, or sale of any article. By such understanding and agreement between the brewers, no brewer would sell to a person indebted to another brewer for beer, and consequently the party indebted was deprived of the right of having them to compete for his trade. He was deprived of the benefit of competition, and left at the mercy of his particular creditor, who could impose any price he saw fit. Suppose the retail dealers at any place were to enter into an agreement that they would not sell to any one who was indebted for goods to either of the others; would not the effect be that the debtor would be confined to the one merchant, and subject to any extortion he might conclude to impose? It would not be contended (at least, it ought not)

that a lawful agreement could be made that but one member of the whole number could sell to certain persons or classes of persons. Yet the effect of the agreement is as broad as that. When the others agree not to sell to the debtor of the creditor member, they deprive the debtor of the right to buy of any other than the creditor. The agreement imposes a penalty upon a condition which is not unlawful, but merely unfortunate.

The effect and tendency of such agreements are wrong, and are not only under the ban of the statute aforesaid, but they are against public policy. Many worthy people, through misfortune, become indebted, and they ought not to be met with an agreement which deprives them of the common right of citizenship to buy of whoever keeps for sale the article wanted. They ought not to be made to labor under a disability which is not imposed upon their more fortunate fellows. It is doubtless true that in many instances some sort of extralegal mode to collect a just debt from a dishonest debtor would find favor in the mind of most men. But we cannot look to individual instances.

The question is, what is the tendency of the agreement, and what are the opportunities for oppression which the statute is designed to suppress? It does not affect the character of the agreement proven, that the brewers only intended a worthy purpose. Intention will not avail when the effect is within the statute. And it has been held by the highest authority that though no imposition was consummated by the raising of prices, and even though the agreement was necessary to curb unjust or ill-advised competition, yet, if the effect of the agreement was within the prohibition of the law, it was void (*U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 54 U. S. App. 747), and that, "in order to vitiate a contract or combination, it is not essential that its result should be complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition" (*U. S. v. E. C. Knight Co.*, 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325), and that the necessary effect of the agreement is the criterion, "no matter what the intent was on the part of those who signed it" (*U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 342, 17 Sup. Ct. 559, 41 L. Ed. 1007). Those cases were examined and approved by the Supreme Court of Missouri in *State v. Insurance Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363, and, in our opinion, much of the principle stated in the latter case can be fairly applied to this.

It is no answer to the view we have taken to say that any one has a right to refuse to sell to whomsoever he may elect. It is true, he may so refuse; but the argument, properly applied, is disastrous to those who advance it. Any one may exercise a choice as to whom he will sell his goods, but he cannot enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement, he is no longer a free agent.

The cases are few where it has ever been held that the individual right may be lawfully exercised collectively by contract. The cases of *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770, and *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, are among them. But it will be noticed that those cases, and any others with similar views, are not based upon statutes. And though decided on what is asserted to be general principles of law, they are not supported by the great weight of authority. Cases *supra*; *Bailey v. Master Plumbers*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561; *Nester v. Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; *Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97; *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Association v. Kock*, 14 La. Ann. 168; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.²⁰

In Kentucky there was a statute similar to ours when the case of *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505, arose. That case was where undertakers combined and agreed not to sell to or wait upon any one in debt to any other member for burial expenses. The plaintiff's wife died, whereupon he went to the Millers to engage their services at the funeral, and to purchase necessary articles for that purpose. They refused him on the ground that he was then indebted to them for burying his father. The other members of the combination or association also refused on the ground of the indebtedness to Millers. Brewster, the plaintiff, then sued the members of the association. The court decided that he had no cause of action, but expressly disclaimed deciding that the defendants were not liable to the penalties and disabilities of the statute, since the action was not one "to enforce any contract or agreement made in violation of the statute."

The case of *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, is not applicable. The case of *Hunt v. Simonds*, 19 Mo. 583, was an action for damages occasioned to the plaintiff on account of a number of insurance companies agreeing to refuse and refusing to insure his steamboat. It was held that the action could not be maintained. The action is not to be likened to the defense in this case, and, besides, was without the support of a statute. Construed as plaintiff would have it, it would be out of harmony with repeated later rulings of the Supreme Court—especially

²⁰ A discussion of the general question as to the legality of action in combination is omitted.

that of *State v. Fireman's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

It is claimed by plaintiff that persons in trade have the right to combine for the purpose of mutual protection against dishonest debtors. That statement is made in the case of *Schulten v. Brewing Co.*, 96 Ky. 224, 28 S. W. 504. While that case did not involve the violation or construction of a statute, and is altogether foreign to the questions involved in this case, yet it is not necessary for us to combat the proposition there stated. The agreement shown here was not an agreement that the brewers would not sell to dishonest debtors. On the contrary, it made no distinction, and cut down the right of any who was in debt for beer to buy beer. Evidently a combination among merchants whereby they, by proper means and in a lawful way, sought to protect themselves against burglars, would not be an unlawful combination. And it may be (it is not our province now to decide) that if it was the practice of persons, dishonest and insolvent, to buy articles from dealers in merchandise, with the fraudulent intention never to pay for them, the dealers could form themselves into an association or combination, and protect themselves from such preys on the thrift of others. But a case of that kind is widely different from the one now before us. The statute, while aiming to protect the public from the evils of monopoly, was not designed to offer facilities for the cheat or fraud.

The result of the foregoing is that a recovery by plaintiff is expressly forbidden, and the judgment must be reversed. The other judges concur.

UNITED STATES v. AMERICAN LINSEED CO.

(District Court of the United States, 1921. 275 Fed. 939.)

CARPENTER, District Judge. In this case the United States, pursuant to the powers and duties imposed upon it by the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), challenged as a combination or conspiracy a contract between the defendants, linseed oil crushers, and the Armstrong Bureau.

The defendant Julian Armstrong, in October, 1918, organized the Linseed Oil Council and operated it as a member of the Armstrong Bureau. The purpose of the council and bureau was to collect and furnish to the various members current quotations on linseed oil, the record of sales of oil, including prices, statistics as to stocks on hand, crop conditions at home and abroad, and other information of interest or value to the manufacturers of linseed oil. The Armstrong Bureau entered into contracts with certain of the defendants and agreed to furnish them the foregoing information for a consideration.

Pursuant to these contracts, the various subscribers daily reported their price lists to the bureau, and promptly sent word of any change.

Other information was also furnished from time to time. The statements received and collected by the bureau were immediately sent out to all the members of the association.

The record discloses that the information collected and distributed by the bureau to its several members was of the kind which a sagacious business man secures, or endeavors to secure, in the operation of his enterprise. The information was true. The price lists furnished were made in the regular course of business, and offered in good faith to customers or prospective customers. There was no proof that the members of the association ever, at the bureau meetings or at any other place, discussed prices or made agreements with respect to prices, and there was no evidence that the prices asked by any of the subscribers were not in accordance with the market price of flaxseed, upon which the price of linseed oil was based.

Production was not limited during the period the bureau was in operation. There was no proof of division of territory. There was no proof that the prices asked by the individual defendants were not fixed by them upon their own judgment, considering all factors affecting supply and demand. There was no proof showing that any member was under the slightest obligation or constraint to ask higher prices or maintain prices.

The main argument for the United States is that the operation of the bureau tended towards a stabilization or uniformity of price on any given day, which was not due to competition, in accordance with economic law.

Many tables of statistics were offered in evidence and read to the court, from which there appeared at times a striking similarity in price, and that changes in prices were made by substantially all the members coincidentally. It appears further that the price of linseed oil is controlled by the price of flaxseed, and that the flaxseed market is an open one in which there are wide fluctuations as well as inactive periods.

The government has not shown that there was artificial regulation of price, either by definite oral or written agreement or by tacit understanding. Each individual crusher entering into a contract with the Armstrong Bureau specifically and expressly agreed that all information reported to the bureau or distributed by it should at all times be purely statistical and pertain only to past operations, and that the bureau should not be used to enable the constituent members to fix prices for the sale of linseed oil, cake, or meal; to limit the sale, production, or manufacture thereof; or to divide the territory in which it was to be sold.

It is incumbent upon the government to show by the clear preponderance of the evidence that the defendants conspired to restrain interstate commerce. In the absence of direct proof of actual entering into of such a combination, and in the face of the denial under oath

of the defendants that any such conspiracy or combination was entered into or made, the government must show that what the defendants did necessarily had the result of restraining trade, or, if it relies upon the circumstantial evidence to show that a conspiracy was actually entered into, it must show to the satisfaction of the court that the circumstances upon which reliance is placed are entirely inconsistent with supposition of innocence.

The question involved is whether an association, such as the Armstrong Agency (sometimes called the "Open Price Plan"), is obnoxious to the anti-trust laws, whether or not there is anything inherently wrong in an agreement between producers in a certain line to furnish each other their prices and not to make any sale deviating from the price list without immediately notifying all the others.

Associations of merchants and manufacturers, boards of trade, and exchanges are of great antiquity. Evidently such associations were not aimed at by the Sherman Act, because they are not mentioned in the act. A distinction is sought to be drawn between the operations of an exchange and what was done by the defendants through the Armstrong Bureau. An exchange sends out reports of actual sales. The Armstrong Bureau gave out price lists. It is difficult to understand any ground for declaring one legal and the other illegal. Every producer or merchant desires to obtain for his goods the highest price he can get. The price which he charges is always the highest which he believes the traffic will bear. He cannot charge, ordinarily, more than his competitors: His competitors' price fixes the point above which he cannot go. When the merchant fixes the price at the level of his competitors, he is fixing it in competition with his rival just as much as though he had named a lower price. The competition of his rival has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors, he will naturally lower the price, and this will establish a new level. This is the essence of what constitutes competition.

Quotations established by the sales on an exchange establish the market value at the time of the sale, but not the market value the day after. The prices at which goods are offered for sale at any moment establish the market value at that moment.

In those lines of merchandising where there are no exchanges, the prices which producers and dealers put upon their goods constitute the market price. *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116. In the trial of that case the judge charged the jury as follows: "The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." The above language was cited and approved by the Supreme Court in *Mus-*

er v. Magone, 55 U. S. 240, at page 249, 15 Sup. Ct. 77, at page 81 (39 L. Ed. 135).

If it is lawful for dealers to get together in an exchange and provide for a dissemination of the prices obtained on actual sales, why should it be unlawful for those producers and dealers in lines where no public exchange has been established, to make some provision for disseminating information of market value or prices? To put it in another way, why should they be limited to the dissemination of the market prices of yesterday, but not those of to-day.

In order to obtain efficiency in business, as well as in any other human activity, it is necessary to have reliable, immediate, and adequate records. With the progress that has been made in the last century it is not to be expected that business alone stood still. In the old days when at noon the business men of the community met in the village blacksmith shop, or in the evening met at the corner grocery, a man was supposed to carry in his head all the facts in regard to his business and never to disclose them to a competitor. Adequate systems of accounting had not been devised. Overhead as a cost element in operation was unheard of. Business was run by the rule of thumb. Such days have gone by. The commercial enterprise of to-day which is not so managed that its head can at any time know how large is his stock, the volume of his sales, the cost of his operation, and the amount of his profit and loss, sooner or later will be distanced by competitors.

It is because business is so much more complex, the volume so much greater, the margin of profit on single transactions so much less, that the merchants of to-day must have at instant command reliable and adequate information, immediately to be secured and more or less permanent in form. Business is no longer a game of chance, but a matter of scientific calculation.

A merchant cannot compete with another merchant unless he knows what he must compete against. A knowledge of what his competitor is charging is the first step in competition. It does not follow, because one man knows the price which his competitor is asking, and he then fixes the same price, that his action is by agreement. If his competitor charges a high price, he naturally will ask the same price if he thinks he can get it. It is absurd to imagine that every merchant does not endeavor to keep posted on the prices asked by his competitor. If he fails to keep posted, he will find himself losing money. If his prices are too high, his customers leave him. If too low, he fails to reap the profit to which he is entitled. The government cannot seriously contend that it is the duty of every merchant to guard against his competitor, finding out what he is charging. It would be an impossibility. Nor is it wrong for a merchant to endeavor to find out what his rivals are charging. If he cannot get it directly and easily, he will necessarily get it indirectly and at a great expense and slowly. He must know in

order to conduct his business properly; nor does the public profit by the mistakes of a merchant charging too much on the one hand or too little on the other, for want of such information. The mistakes would in all probability fall equally on either side.

Quick and accurate information of what his competitors are charging naturally leads to uniformity in prices. But because one merchant charges the same price that the other merchant charges, because he finds that he can get it, does not necessarily indicate that there is any agreement between them to charge the same price. As the Supreme Court said, in the Steel Case, 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121, a uniformity in price does not prove a conspiracy.

What applies to sales for present delivery, applies equally to sales for future delivery.

Much has been made by counsel for the government of the fact that prices of oil went up along with the price of flaxseed; that afterwards when flaxseed declined sharply, the price of oil did not come down at the same rate, but declined at a much slower pace. The court will take judicial knowledge that for the past several months a decline in prices has been going on. The government has failed to show that the phenomenon of the price of oil declining at a slower rate than the price of flaxseed was not common in other lines, where the price of raw materials has fallen. That the price of the finished product on a declining market will fall at a slower rate than the price of the raw material is natural, and therefore expected. The price of the finished material, under conceded economic rules in the market where there is competition, will depend upon the supply and demand of the finished material. The drop in the price of the raw material does not affect the supply of the finished material. Time must elapse before the supply of finished material is increased by the low prices of raw material, and until the supply of finished material is increased, assuming that the demand remains constant, no decline in price may be expected. When the price of raw material starts to go up, less of the finished material will be produced, and stoppage or slowing up of the manufacture of the finished material will be at once reflected in an increased price.

The court should not construe the acts of the defendants to be illegal when it can, with equal facility, ascribe them to an innocent intention. But it is charged by the government that the defendants themselves claim that the effect of the bureau was to stabilize prices. That is to say, as a result of accurate and instant knowledge on the part of producers, the price of linseed oil, instead of varying sharply from day to day, as shown by the sales made, assumed an average price without the deviations. If these deviations before had been the result of real competition, based on accurate knowledge by the producers of the real market conditions, then the government is far from sustaining its con-

tentions. The defendants, however, have shown, and their evidence is uncontradicted, that the deviations before existing were caused by the individual producers endeavoring to meet prices of their competitors which had never been made; and it is common in the trade for buyers to make false representations as to the prices made by other producers. Surely, such a condition is not the one that the Sherman Act aims to foster.

The government was greatly disturbed by a statement in the defendant Ferry's books that the Armstrong Bureau brought about a stabilized market. This expression seems to have been a great bugaboo. Counsel for plaintiff would have the court believe that the term "stabilized market" means nothing other than uniform prices. Whatever the proper definition of the phrase, the record does not show that there was a stabilization or uniformity in prices.

The defendants contend, and I agree, that the term "stabilized market" means the obtaining and distributing of any accurate information that would enable crushers and buyers of linseed oil the better to understand the conditions of the flaxseed and oil market, to the end that the speculative hazards which formerly had worked injury to both seller and buyer would be minimized and eventually eliminated, and the economic law of supply and demand be more intelligently put into operation.

Complaint is made against what is called the "zone system" and differentials applying thereto. It is true the prices quoted had reference to certain well-defined territory, and the prices were accompanied by differentials to equalize the cost of railroad transportation. The record shows that these differentials were adopted after a thorough and intelligent investigation of freight rates from the base point to point of delivery, and the addition to the base price in the different zones was arrived at after a fair averaging of those freight rates into the designated territory.

Zoning for the purpose of fixing rates is not new. The Interstate Commerce Commission permits it in regulating the charges to be made by railroads. It is not a perfect system, and there is always a certain amount of discrimination to those who live on or near the dividing line between zones, and I have no doubt a few buyers of oil may have been to some extent penalized, but every buyer had the option of purchasing f. o. b. point of manufacture, or f. o. b. point of delivery, and I must assume that this buyer would choose that f. o. b. point which seemed the most to his advantage.

The charge of the government that the zone differentials were adopted in order that the price charged for oil would be artificially enhanced, and the defendant crushers consequently enriched, is not borne out by the evidence. There was no zone in which all the crushers did business, and the bulk of the finished product sold by the defendants was for delivery in zones carrying minimum freight differentials.

Counsel for the government seeks to draw an inference of guilt from the admission of defendants that the bureau allowed them to sleep nights. The only restraint which the rules of the bureau on their face impose is that the members agree not to deviate from their price lists without informing the other members at once by telegraph. At the close of each business day every member knew until the next day what the market was. It seems to me that the situation thus created is not dissimilar from that sustained by the United States Supreme Court in *Chicago Board of Trade v. United States*, 246 U. S. 231, 38 Sup. Ct. 242, 62 L. Ed. 683. It is very evident that the Supreme Court does not believe that the Sherman Act should prevent men from sleeping nights.

The Armstrong Bureau was organized solely for the purpose of furnishing information not only to the linseed oil crushers, but to those interested in every other industry. It was a bureau of intelligence, and one which makes for real rather than artificial competition in trade. There was no restriction placed upon any member. He was free to buy from and sell to whomever he chose. The bureau operated solely as to past transactions, and wherever there is freedom of contract on the part of the constituent members there cannot be a violation of the Sherman Act.

The prosecution, down deep, evidently believes that an association of producers or merchants must necessarily be obnoxious to the Sherman Act because it affords an opportunity for the members to conspire to restrain trade. Where there is such an association, it is perfectly natural for members to express themselves as to conditions and prices; in fact, that is what the association is formed for, and these expressions have been seized upon by counsel as evidence to show that a corrupt agreement was actually made.

To my mind some of these expressions are evidence that no such agreement was in fact made, if they are evidence of anything. It would be perfectly natural, among a meeting of oil men, for some one to say that he thought prices ought to be higher. The meaning conveyed by such an expression would be that the man was at a loss to understand why prices were not higher, taking into consideration the demand and supply and conditions of the trade. I might well say to-day that the weather ought to be cooler without laying myself open to the imputation that the temperature had been fixed by an agreement of mine.

Logic which assumes that because there is an opportunity to fix prices, therefore prices are fixed, is contrary to the genius and theory of our law. Every man is presumed to be innocent until he is proved to be guilty. If the Armstrong Bureau is to be dissolved merely because it afforded an opportunity for the members to fix prices, then this court, with equal propriety, could be asked to dissolve any lunch club where business men meet. This theory hardly warrants discus-

sion, and I would not mention it had I not been gravely urged in this case, that such was the underlying thought of the prosecution. It is the ancient fallax—post hoc propter hoc.

The bill will be dismissed for want of equity.

AMERICAN COLUMN & LUMBER CO. v. UNITED STATES.

(Supreme Court of the United States, 1921. 257 U. S. 377, 42 Sup. Ct. 114, 66 L. Ed. —.)

Suit by the United States against the American Column & Lumber Company and others. From a decree granting a permanent injunction (263 Fed. 147), defendants appeal. * * *

Mr. Justice CLARKE delivered the opinion of the Court.²¹

The unincorporated "American Hardwood Manufacturers' Association" was formed in December, 1918, by the consolidation of two similar associations, from one of which it took over a department of activity designated the "Open Competition Plan," and hereinafter referred to as the "Plan."

Participation in the Plan was optional with the members of the Association, but at the time this suit was commenced, of its 400 members, 365, operating 465 mills, were members of the Plan. The importance and strength of the Association is shown by the admission in the joint answer that, while the defendants operated only 5 per cent. of the number of mills engaged in hardwood manufacture in the country, they produced one-third of the total production of the United States. The places of business of the corporations and partnerships members of the Plan were located in many states from New York to Texas, but chiefly in the hardwood producing territory of the Southwest. The defendants are the members of the Plan, their personal representatives, and F. R. Gadd, its "Manager of Statistics."

The bill alleged, in substance, that the Plan constituted a combination and conspiracy to restrain interstate commerce in hardwood lumber by restricting competition and maintaining and increasing prices, in violation of the Anti-Trust Act of 1890 (26 Stat. 209 [Comp. St. §§ 8820-8823, 8827-8830]).

The answer denied that the Plan had any such purpose and effect as charged, and averred that it promoted competition, especially among its own members. * * *

The activities which we shall see were comprehended within the "Open Competition Plan" (which is sometimes called the "New Competition") have come to be widely adopted in our country, and, as this is the first time their legality has been before this court for decision, some detail of statement with respect to them is necessary.

There is very little dispute as to the facts. The testimony of the

²¹ Minor parts of this opinion are omitted.

government consists of various documents and excerpts from others, obtained from the files of the Plan, and the testimony of the defendants consists of like documents and excerpts from other documents, also from the same files, supplemented by affidavits of a number of persons, members and nonmembers, chiefly to the point that the confessedly great increases of prices during 1919 were due to natural trade and weather conditions and not to the influence of the Plan.

The record shows that the Plan was evolved by a committee, which, in recommending its adoption, said:

"The purpose of the plan is to disseminate among members accurate knowledge of production and market conditions so that each member may gauge the market intelligently instead of guessing at it; to make competition open and above board instead of secret and concealed; to substitute, in estimating market conditions, frank and full statements of our competitors for the frequently misleading and colored statements of the buyer."

After stating that the purpose was not to restrict competition or to control prices but to "furnish information to enable each member to intelligently make prices and to intelligently govern his production," the committee continues:

"The chief concern of the buyer, as we all know, is to see that the price he pays is no higher than that of his competitors, against whom he must sell his product in the market. The chief concern of the seller is to get as much as anybody else for his lumber; in other words to get what is termed the top of the market for the quality he offers. By making prices known to each other they will gradually tend toward a standard *in harmony with market conditions*, a situation advantageous to both buyer and seller.

Not long after the consolidation, a further explanation of the objects and purposes of the Plan was made in an appeal to members to join it, in which it is said:

"The theoretical proposition at the basis of the Open Competition Plan is that

"Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels."

"The Open Competition Plan is a central clearing house for information on prices, trade statistics and practices. By keeping all members fully and quickly informed of what the others have done, the work of the Plan results in *a certain uniformity of trade practice*. There is no agreement to follow the practice of others, *although members do follow their most intelligent competitors*, if they know what these competitors have been actually doing.

"The monthly meetings held in various sections of the country each month have improved *the human relations* existing between the members before the organization of this Plan."

And in another later and somewhat similar appeal, sent to all the members, this is found:

"Competition, blind, vicious, unreasoning, may stimulate trade to abnormal activity, but such condition is no more sound than that medieval spirit some still cling to of taking a club and going out and knocking the other fellow and taking away his bone.

"The keynote to modern business success is mutual confidence and co-operation. *Co-operative competition, not cutthroat competition.* Co-operation is a matter of business, because it pays, because it enables you to get the best price for your product, because you come into closer *personal contact with the market.*

"Co-operation will only replace *undesirable competition* as you develop a co-operative spirit. For the first time in the history of the industry, the hardwood manufacturers are organized into one compact, comprehensive body, equipped to serve the whole trade in a thorough and efficient manner. * * * More members mean more power to do more good for the industry. With co-operation of this kind we will very soon have enlisted in our efforts practically every producing interest, *and you know what that means.*"

Thus the Plan proposed a system of co-operation among the members, consisting of the interchange of reports of sales, prices, production, and practices, and in meetings of the members for discussion, for the avowed purpose of substituting "co-operative competition" for "cutthroat competition," of keeping "prices at reasonably stable and normal levels," and of improving the "human relations" among the members. But the purpose to agree upon prices or production was always disclaimed.

Coming, now, to the fully worked out paper plan as adopted:

It required each member to make six reports to the secretary, viz.:

1. A *daily* report of all sales actually made, with the name and address of the purchaser, the kind, grade and quality of lumber sold and all special agreements of every kind, verbal or written with respect thereto. "The reports to be exact copies of orders taken."

2. A *daily* shipping report, with exact copies of the invoices, all special agreements as to terms, grade, etc. The classification shall be the same as with sales.

3. A *monthly* production report, showing the production of the member reporting during the previous month, with the grades and thickness classified as prescribed in the Plan.

4. A *monthly* stock report by each member, showing the stock on hand on the first day of the month, sold and unsold, green and dry, with the total of each, kind, grade and thickness.

5. Price-lists. Members must file at the beginning of each month price-lists showing prices f. o. b. shipping point, which shall be stated. New prices must be filed with the association as soon as made.

6. Inspection reports. These reports are to be made to the association by a service of its own, established for the purpose of checking up grades of the various members and the Plan provides for a chief inspector and sufficient assistants to inspect the stocks of all members from time to time.

The declared purpose of the inspection service is not to change any member's grading except with his consent, but to furnish each member a basis on which he can compare his prices with those of other members, thereby making all members' reports more intelligible and accurate.

All of these reports by members are subject to complete audit by representatives of the association. Any member who fails to report *shall not receive the reports* of the secretary, and failure to report for twelve days in six months shall cause the member failing to be dropped from membership.

Plainly it would be very difficult to devise a more minute disclosure of everything connected with one's business than is here provided for by this Plan, and very certainly only the most attractive prospect could induce any man to make it to his rivals and competitors.

But, since such voluminous disclosures to the secretary would be valueless, unless communicated to the members in a condensed and interpreted form, provision is made for this, as follows:

The secretary is required to send to each member:

1. A *monthly* summary showing the production of each member for the previous month, "subdivided as to grade, kind, thickness," etc.

2. A *weekly* report, not later than Saturday, of all sales, to and including the preceding Tuesday, giving each sale and the price, and the name of the purchaser.

3. On Tuesday of each week the secretary must send to each member a report of each shipment by each member, complete up to the evening of the preceding Thursday.

4. He must send a *monthly* report, showing the individual stock on hand of each member and a summary of all stock, green and dry, sold and unsold. This report is very aptly referred to by the managing statistician as a monthly inventory of the stock of each member.

5. Not later than the 10th of each month the secretary shall send a summary of the price-lists furnished by members, showing the prices asked by each, and any changes made therein must be immediately transmitted to all the members.

6. A market report letter shall be sent to each member of the association (whether participating in the plan or not) pointing "out changes in conditions both in the producing and consuming sections, giving a comparison of production and sales and in general an analysis of the market conditions."

7. Meetings shall be held once a month at Cincinnati "or at points to be agreed upon by the members." "It is intended that the regular

meetings shall afford opportunity for the discussion of all subjects of interest to the members."

"The plan also requires the selection of a man to take charge of the gathering and dissemination of data, with necessary assistants," and the defendant F. R. Gadd was selected and given the title of "Manager of Statistics."

This extensive interchange of reports, supplemented as it was by monthly meetings at which an opportunity was afforded for discussion "of all subjects of interest to the members," very certainly constituted an organization through which agreements, actual or implied, could readily be arrived at and maintained, if the members desired to make them.

Such, in outline, was the paper plan adopted by the association, but, elaborate though it was, in practice three important additions were made to it.

First of all, the Southwestern territory for meeting purposes was divided into four districts, and instead of the monthly meeting provided for in the Plan, "in order that members could more conveniently attend," the record shows that 49 of these meetings were held between January 31, 1919, and February 19, 1920—approximately one for each week, in some part of the territory.

Second. Before each of these meetings a questionnaire was sent out to the members, and from the replies received, supplementing the other reports, the statistician compiled an estimate of the condition of the market, actual and prospective, which was distributed to the members attending each meeting, and was mailed to those not present. There were 11 questions on this list, of which the most important were:

"(4) What was your total production of hardwood during the last month? What do you estimate your production will probably be for the next two months?"

"(10) Do you expect to shut down within the next few months on account of shortage of logs or for any other reason? If so, please state how long you will be idle?"

"(11) What is your view of market conditions for the next few months and what is the general outlook for business? State the reasons for your conclusion."

The Plan on paper provided only for reports of past transactions and much is made of this in the record and in argument—that reporting to one another past transactions cannot fix prices for the future. But each of these three questions plainly invited an estimate and discussion of future market conditions by each member, and a co-ordination of them by an expert analyst could readily evolve an attractive basis for cooperative, even if unexpressed, "harmony" with respect to future prices.

Third. The Plan provided for a monthly "market report letter" to go to all members of the association. In practice this market report letter was prepared by F. R. Gadd, manager of statistics, but his re-

view of the market and forecast for the future were contained, almost from the beginning, not only in these market letters but also in the weekly sales reports, so that they were sent out to all of the members 19 times between February 1 and December 6, 1919, and they were discussed at all but one or two of the 49 meetings which were held. All the activities of the Plan plainly culminated in the counsels contained in these letters and reports.

This elaborate plan * * * not only furnishes such information with respect to stock, sales and prices, but also reports, giving the views of each member as to "market conditions for the next few months"; what the production of each will be for the next "two months"; frequent analyses of the reports by an expert, with, we shall see, significant suggestions as to both future prices and production; and opportunities for future meetings for the interchange of views, which the record shows were very important. It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. But this is supplied: By the disposition of men "to follow their most intelligent competitors," especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of "harmony" of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals.

The principles of law by which we must judge of the legality of the scheme of doing business thus provided for, as it was worked out in practice, are clearly settled by the anti-trust statute and the decisions of this court interpreting it. * * *

It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce, falls within the condemnation of the act and is unlawful [citing *Northern Securities Co. v. United States*, 193 U. S. 197, 337, 24 Sup. Ct. 436, 457 (48 L. Ed. 679); *United States v. Union Pacific Railroad Co.*, 226 U. S. 61, 87, 33 Sup. Ct. 53, 58 (57 L. Ed. 124); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 609, 34 Sup. Ct. 951, 953 (58 L. Ed. 1490, L. R. A. 1915A, 788)].

With this rule of law and the details of the Plan in mind, we come to consider what the record shows as to the purpose of this combination and as to its effect upon interstate commerce. * * *

Mr. Gadd was a man of large experience in the lumber business, competent and aggressive, and the record makes it clear that he was in complete and responsible charge of all the activities of this Open

Competition Plan. He compiled the summaries of daily, weekly, and monthly reports, and wrote the monthly market letter and the market comment in the weekly sales reports, which were distributed to the members. Some disposition appears in the argument, but not in the evidence, to suggest that Gadd exceeded his authority at times, but no objection appears to have been taken to any of his conduct, and the "Secretary-Manager" says in his affidavit that his office adjoins that of Gadd and that "he (Gadd) and affiant have frequent conferences and discussions relating to their work, and that affiant is familiar with the activities and method of the Open Competition Plan."

It is plain that as the Plan was the "clearing house" of the members, "for information on prices, trade statistics, and practices," so Gadd was the "clearing house" of the Plan, and that what he said and did, acquiesced in by the members, as it was, must be accepted as the authoritative expression of the combination.

The record shows that the lumber market was inactive in the months of January and February and the first part of March of 1919. It grew better late in March, and progressively stronger until in July, when it became very active, with prices high, and so continued until the end of the year we are considering.

In the first quarter of the year the problem was to maintain the war prices then prevailing rather than to advance them, and although the minutes of the various meetings were kept in barest outline, we find that, beginning within a month of the consideration of the two associations, the members of the Plan began actively to co-operate through the meetings, to suppress competition by restricting production. This is very clearly shown by the excerpts following from the minutes of meetings and from the market letters and sales reports distributed at them.

Thus, at the meeting held at Cincinnati, on January 21, 1919, in the discussion of business conditions, the chairman said: "If there is *no increase in production*, particularly in oak, there is going to be good business. * * * *No man is safe in increasing production*. If he does, he will be in bad shape, as the demand won't come."

Again, at the meeting held on May 9th, at Memphis, in the discussion of market conditions, appears this paragraph:

"Reference was made to members who contemplate running day and night, and it was stated that the lumber industry had seen these unusual market conditions before and that we ought to be very sure that the market is capable of taking care of night and day lumber."

This warning of May 9th against producing too much lumber was followed, on May 17th, by a sales report sent out by the Manager of Statistics to all members, which was headed, "Stop, Look and Listen." After saying that the hardwood market had assumed a decidedly better tone, with a tendency in quotations upward, with the demand on the increase and with stocks below normal, the writer continues:

"The lumbermen have gone through several lean years, but we are

confronted with the possibility of killing the goose that laid the golden egg. *Overproduction will spell disaster*, as it should always be borne in mind that the maximum productive capacity of the sawmills of the country is much in excess of any demand the country has ever known."

He then quotes from an editorial in the *Southern Lumberman*, in which, among other things, it is said: "*The danger which we see lurking in the future for the lumber industry is overproduction*. When the demand for lumber is good and the prices are good, it is a strong temptation to the sawmill men to put night shifts at the mill and an extra logging crew in the woods and keep turning out lumber 24 hours in the day. The desire to cash in while the cashing is good is natural and easy to understand, but every sawmill man who contemplates putting on a night shift should stop long enough to reflect on the past history of the lumber business. If he does indulge in such reflection the chances are he will give up any ideas he may have along that line. *Overproduction* has always been the curse of the lumber industry in America. It has caused more trouble and hardship than any other one factor. It would be criminal folly therefore for the lumber manufacturers to indulge themselves in any such form of commercial suicide."

Adding that the lumbermen have within their grasp an era of prosperity for some time to come, the writer continues: "They can either reach forward to seize their opportunity or *they can cast it aside by the policy of overproduction*. Which shall it be? It is up to the sawmill men themselves to decide." The managing statistician of the association significantly adds: "*Are we guilty? If so, the warning is timely.*"

Again, a week later, at a meeting at Shreveport, Louisiana, in the discussion of market conditions, one of the members declared that in his opinion it was "*suicidal to run a mill night and day*; that the pine mills had done it, but he hoped that (we) would profit by their past experience and not do it this year."

Much more of like purport appears in the minutes of the meetings throughout the year, but this is sufficient to convincingly show that one of the prime purposes of the meetings, held in every part of the lumber district and of the various reports, was to induce members to co-operate in restricting production, thereby keeping the supply low and the prices high, and that whenever there was any suggestion of running the mills to an extent which would bring up the supply to a point which might affect prices, the advice against operations which might lead to such result was put in the strongest possible terms. The co-operation is palpable and avowed, its purpose is clear, and we shall see that it was completely realized.

Next, the record shows clearly that the members of the combination were not satisfied to secure, each for himself, the price which might be obtainable even as the result of co-operative restriction of production, but that throughout the year they assiduously cultivated, through the letters of Gadd, speaking for them all, and through the discussions at the meetings, the general conviction that higher and higher

prices were obtainable and a disposition on the part of all to demand them. The intention to create such a common purpose is too clear to be doubted, evidenced as it is by the following excerpts from much of like character in the testimony:

As thus, in the stock report of March 8, 1919, after pointing out that the stock at the mills was only about three-fourths normal and that the production in the Memphis group of manufacturers was only 56 per cent. of normal, the letter of the Manager of Statistics continues:

"There has been a long drawn out and desperate effort to break the hardwood market by withdrawal of demand; but, be it said to the eternal credit of the hardwood producers, *they have maintained a stout heart and stiff backbone*, with the result that there has been exhibited a strength in the market which has been little short of remarkable in the face of the light demand and the vigorous efforts which have been steadily made *to hammer down prices*. * * * With this known information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to *the proper course for him to pursue* in selling his lumber." And it may be added that it is not difficult to see what this "proper course to pursue" was intended to be.

Again, three weeks later, in the market letter of March 29th, after stating that stocks had further decreased from the previous month, with a production not to exceed 50 per cent. of normal, the Manager of Statistics of the Plan adds: "Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman. If the facts were better understood, *offers of business now at shaded prices would get scant consideration* and there would not only be *no good reason to cut prices*, but there would be every reason why they should be held at reasonable profit making levels. * * * All conditions indicate a firm market for the balance of the year, with prices moving upward."

Another month later, in the market letter of April 26th, this influential agent of the association, after pointing out that stocks were less than 75 per cent. of normal, that production was about 60 per cent. of normal and that the demand was far in excess of the supply, adds: "If ever there was a time when rich rewards awaited the producer of hardwood lumber, now is that time. *There are glorious opportunities ahead*. * * * Supply and demand must necessarily govern prices. The demand is with us, the supply inadequate, therefore *values must increase, as our competition in hardwood is only among ourselves*."

Again, in another month, May 24th, in his sales report, the Manager of Statistics, after stating that production during the month of April was 65 per cent. of normal and that a careful estimate indicated that there would be no material increase in May and June, says: "If any one tells you that lumber prices are coming down, call their at-

tention to the following: *Curtailed production of mills; stocks below normal; necessity on the part of lumber operators of obtaining a price level that will enable them to make a reasonable profit.*" And he concludes with: "The tendency of the market is upward, and will undoubtedly continue to advance so long as sales and production bear their present relation to each other."

Again on September 20th, in his market letter, he says: "It has been rumored that a certain class of buyers, believing that the price of lumber was too high, and that the temporary inactivity in the export market offered the opportune moment, have agreed to confine purchases to actual immediate requirements during the next 60 days. This is not going to worry the manufacturers very much; in fact, it will give them a much needed breathing spell and an opportunity to accumulate a supply of dry stocks which, in our opinion, is the same as gold dollars in the bank. * * * Those who have been looking for lower prices overlook the very important factors: That production continues below normal; * * * that unsold stocks at mills are seventy per cent. below normal; that the export demand has just started. * * *" And he concludes: "With these conditions prevailing there is *nothing in the situation that should encourage any one to hope for a drop in quotations.*"

To this we must add that constantly throughout the minutes of the various meetings there is shown discussion of the stock and production reports in which the shortage of supply was continually emphasized, with the implication, not disguised, that higher prices must result. Men in general are so easily persuaded to do that which will obviously prove profitable that this reiterated opinion from the analyst of their association, with all obtainable data before him, that higher prices were justified and could easily be obtained, must, inevitably have resulted, as it did result, in concert of action in demanding them.

But not only does the record thus show a persistent purpose to encourage members to unite in pressing for higher and higher prices, without regard to cost, but there are many admissions by members, not only that this was the purpose of the Plan, but that it was fully realized.

Within four months of the consolidation, on April 23, 1919, the Manager of Statistics wrote to members asking each to write him "his experience with the Plan" and any incidents showing benefits derived from it.

The replies to this letter are significant confessions. One writes: "All who have access to your reports bring their prices to the top."

Another: "There seems to be a friendly rivalry among members to see who can get the best prices; whereas, under the old plan, it was cutthroat competition."

Another: "It has kept us in touch closely with the market and in many instances has made us one or more dollars per thousand feet on

the lumber sold, and we believe the plan is going to be very successful in carrying out the purposes for which it was intended."

Another: "From the first report we received under this plan we were enabled to increase our price \$6 per thousand on a special item of oak. We had just taken a small order at what we thought a satisfactory price, but discovered immediately that others were getting more money. Since then we have booked orders for a number of these special items at the increase of \$6 per thousand."

Another: "Since we became members we have been selling our lumber at several dollars per M more than formerly, and we are perfectly satisfied with the plan."

And another: "*We have always left these meetings feeling that we did not get money enough for our lumber and that we ought to try to do better.*"

There was one discordant reply, saying: "The Open Competition Plan has been absolutely accurate, but, instead of stabilizing the market, it has caused a runaway market."

This on May 29th, within six months of the forming of the combination.

These quotations are sufficient to show beyond discussion that the purpose of the organization, and especially of the frequent meetings, was to bring about a concerted effort to raise prices regardless of cost, or merit, and so was unlawful, and that the members were soon entirely satisfied that the Plan was "carrying out the purpose for which it was intended."

As to the price conditions during the year: Without going into detail, the record shows that the prices of the grades of hardwood in most general use were increased to an unprecedented extent during the year. Thus, the increases in prices of varieties of oak, range from 33.3 per cent. to 296 per cent. during the year; of gum, 60 per cent. to 343 per cent., and of ash, from 55 per cent. to 181 per cent. While it is true that 1919 was a year of high and increasing prices generally, and that wet weather may have restricted production to some extent, we cannot but agree with the members of the Plan themselves, as we have quoted them, and with the District Court, in the conclusion that the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase.

Such close co-operation, between many persons, firms, and corporations controlling a large volume of interstate commerce, as is provided for in this Plan, is plainly in theory, as it proved to be in fact, inconsistent with that free and unrestricted trade which the statute contemplates shall be maintained, and that the persons conducting the association fully realized this is apparent from their protesting so often as they did, in many of their confidential communications appearing in this record, that their purposes were not unlawful, that they sought only to supplant cutthroat competition with what in their own judgment would be "fair and reasonable competition," and to obtain, not

make, fair prices, and by their repeated insistence that the Sherman Law, "designed to prevent the restraint of trade, is itself one of the greatest restrainers of trade, and should be repealed."

To call the activities of the defendants, as they are proved in this record, an "Open Competition Plan" of action is plainly a misleading misnomer.

Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit, and their stocks to the discretionary inspection, of their rivals, for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is, and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce, and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a "new form of competition," and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see, and understand and condemn, as an old evil in a new dress and with a new name.

The Plan is, essentially, simply an expansion of the gentleman's agreement of former days, skillfully devised to evade the law. To call it open competition, because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, cannot conceal the fact that the fundamental purpose of the Plan was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects, not upon fines and forfeitures as in earlier days, but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties—cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together under the subtle direction of a single interpreter of their common purpos-

es, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do.

In the presence of this record it is futile to argue that the purpose of the Plan was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on Boards of Trade or Stock Exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only; and another is that there is no skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued.

Convinced, as we are, that the purpose and effect of the activities of the Open Competition Plan, here under discussion, were to restrict competition, and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber, by concerted action in curtailing production and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-Trust Act of 1890 (26 Stat. 209), and the decree of that court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

When there are competing sellers of a class of goods, knowledge of the total stock on hand, of the probable total demand, and of the prices paid, of course will tend to equalize the prices asked. But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides. A combination to get and distribute such knowledge, notwithstanding its tendency to equalize, not necessarily to raise, prices, is very far from a combination in unreasonable restraint of trade. It is true that it is a combination of sellers only, but the knowledge acquired is not secret, it is public, and the buyers, I think I may assume, are not less active in their efforts to know the facts. A combination in unreasonable restraint of trade imports an attempt to override normal market conditions. An attempt to conform to them seems to me the most reasonable thing in the world. I see nothing in the conduct of the appellants that binds the members even by merely social sanctions to anything that would not be practised, if we could imagine it, by an allwise socialistic government acting for the benefit of the community as a whole. The parties to the combination are free to do as they will.

I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge

as desirable. It prohibits the distribution of stock, production, or sales reports, the discussion of prices at association meetings, and the exchange of predictions of high prices. It is true that these acts are the main evidence of the supposed conspiracy, but that to my mind only shows the weakness of the Government's case. I cannot believe that the fact, if it be assumed, that the acts have been done with a sinister purpose, justifies excluding mills in the backwoods from information, in order to enable centralized purchasers to take advantage of their ignorance of the facts.

I agree with the more elaborate discussion of the case by my Brother **BRANDEIS**.²²

BOHN MFG. CO. v. HOLLIS.

(Supreme Court of Minnesota, 1893. 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.)

MITCHELL, J. The pleadings in this case, and the affidavits read on the motion to dissolve the temporary injunction, are so voluminous, and so abound in mere inferences as to motives and consequences, and in adjectives and other qualifying epithets, as to convey the impression, at first sight, that the facts were both complicated and controverted. But a careful analysis of the record proves that there is no real dispute as to the material facts, which are comparatively simple. Stripped of all extraneous matter, the case discloses just this state of facts:

The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with the retail lumber dealers. The defendant the Northwestern Lumbermen's Association is a voluntary association of retail lumber dealers, comprising from 25 to 50 per cent. of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in

²² The dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice McKenna concurred, is omitted.

sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this case.

The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for 10 per cent. of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon, plaintiff commenced this action for a permanent injunction, and obtained, *ex parte*, a temporary one, enjoining the defendants from issuing these notices, etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts must be presumed to be true, that if these notices should be issued the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's Case*, 11 Coke, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, "to manage the state."

But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and ex-

pressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages are not only a public convenience, but a public necessity; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade.

Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for 10 per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points, it would probably conclude to pay; otherwise, not.

It cannot be claimed that the act of making this demand was actionable; much less, that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be "expelled;" but this simply meant to cease to be members. It was wholly a matter

of their own free choice, which they preferred—to trade with the plaintiff, or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544.

2. If an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." *Heywood v. Tillson*, 75 Me. 225; *Phelps v. Nowlen*, 72 N. Y. 39; *Jenkins v. Fowler*, 24 Pa. St. 308.

3. To enable the plaintiff to maintain this action, it must appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but, even if it were, this would not, of itself, give plaintiff a cause of action. No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose re-

marks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. *Bowen v. Matheson*, 14 Allen, 499; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 3 Cush. 145; *Payne v. Railway Co.*, 13 Lea, 507.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful or actionable in it. *Com. v. Hunt*, supra; *Carew v. Rutherford*, 106 Mass. 1; *Steamship Co. v. McGregor*, [1892] App. Cas. 25.

Order reversed, and injunction dissolved.

WHOLESALE GROCERS' ASS'N v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1922. 277 Fed. 657.)

Petition to Revise Order of Federal Trade Commission, Sitting at Washington, D. C.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge.²³ * * * The order complained of was made in a proceeding which was initiated by a written complaint made

²³ The opinion is abridged by the omission of part of the statement of facts.

by the Commission against the petitioners and others, some of the parties so proceeded against being wholesale grocers or jobbers having their principal offices and places of business at El Paso, and others being brokers engaged in the business at El Paso of selling the products of manufacturers of groceries and food products. * * * The Wholesale Grocers' Association of El Paso, Tex., * * * the members of which were wholesale grocers or jobbers at El Paso, came into existence in the fall of 1917 at the request of the local representative of the United States Food Administration, for the purpose of discussing and complying with rules and regulations promulgated during the war by the Food Administration and other government agencies having to do with conservation, profiteering and other matters dealt with by such agencies. The meetings of the association were held informally from time to time in the offices of different members, and were attended more or less regularly by the members, including those who are petitioners in this case. No formal minutes or records of the proceedings of the association were kept. The jobbers so coming together did not confine their discussions to the subjects for dealing with which the association was formed. Among subjects discussed by the jobbers when so brought together was that of manufacturers selling to grocers doing both a wholesale and a retail business; those discussions having special reference to the case of sales by manufacturers to the Standard Grocery Company. It was disclosed that the associated jobbers, without dissent, condemned the practice of some manufacturers in selling to that company on the same terms and conditions as those accorded to such jobbers. The Standard Grocery Company, which was organized in 1916, owned and operated six retail grocery stores in El Paso, in one of which it conducted for several years a wholesale grocery business, having storage and warehouse facilities therefor in the basements of several of its storehouses. In the fall of 1917 it opened a branch house at Deming, N. M., where it engaged, until about January 1, 1919, exclusively in the business of buying and selling in wholesale quantities groceries and other food products; its purchases and sales, at both El Paso and Deming, including such as were transactions in interstate commerce. It was in active competition at El Paso and Deming with the associated jobbers, both it and such jobbers selling to retail grocers, restaurants, cafés, commissaries of industrial and railway companies, army post exchanges and zone supply offices, civilian branches of the United States government, army hospitals, and other federal and state institutions. Following such discussions and adverse criticisms of the associated jobbers there were numerous instances of it being brought to the attention of manufacturers that sales by them direct to the Standard Grocery Company were objected to by the associated jobbers at El Paso, and that the continuance of such sales would cause those jobbers to withhold patronage from such manufacturers; the means whereby such manufac-

turers were so advised including letters to them from brokers at El Paso handling their products plainly disclosing that sales of those products direct to the Standard Grocery Company constituted an obstacle to selling those products to the associated jobbers at El Paso, numerous inquiries made by such jobbers of traveling salesmen of manufacturers as to whether their principals sold direct to the Standard Grocery Company, and other incidents indicating that such sales were condemned by the associated jobbers and the brokers at El Paso.

We are of opinion that direct and circumstantial evidence adduced furnished support for the inferences that there was concert of action by the petitioners and others with the object of preventing sales by manufacturers and their agents to the Standard Grocery Company of food products and other groceries in wholesale quantities, at the prices and on the terms accorded to other wholesalers or jobbers similarly situated, that that concert of action was a result and in pursuance of an agreement or understanding to which the petitioners and others were parties, and that by the means indicated sales by manufacturers and their agents to the Standard Grocery Company were hindered or impeded, and that company was prevented from buying as a wholesaler in interstate commerce as it would have done without such opposition by the petitioners and others co-operating with them.

It is contended that the attacked order should be set aside: (1) Because the evidence upon which the Commission acted did not support any of its findings as to the petitioners combining, conspiring, and co-operating as set forth; and (2) because the conduct of the petitioners stated in the findings did not amount to or involve an unfair method of competition in commerce, within the meaning of the provision of section 5 of the Federal Trade Commission Act (38 Stat. 717).

Evidence of an express agreement to obstruct or prevent dealings with the Standard Grocery Company as a legitimate wholesaler or jobber was not necessary to support the charges made. A conspiracy may be inferred from the things actually done by the alleged conspirators, where those things are the natural consequences of an agreement or understanding to do them, and help to accomplish a disclosed common purpose. *Eastern States Lumber Association v. United States*, 234 U. S. 600, 612, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. What happened after it was disclosed that the associated jobbers were in accord in condemning sales of their products by manufacturers or their agents to a competitor which was obnoxious because it was a retailer as well as a wholesaler indicated the existence of an agreement or understanding between the petitioners and others to take concerted action to obstruct or prevent the continuance of such sales. As above indicated, we are not of opinion that the order of the Commission is subject to be set aside on the ground that no substantial evidence supporting its findings of fact was adduced. Failure to recognize or concede due probative effect to significant circumstances disclosed is a fault in criticism by counsel of the evidence adduced.

Part of that criticism involves the assumption that the Commission was bound to believe testimony relied on to support the conclusion that conduct of one of the petitioners did not have the meaning or effect indicated by a written communication signed by its representative. It was for the Commission to pass on the credibility of that testimony.

Whether the conduct of the petitioners which is the subject of the attacked order to cease and desist comes within the meaning of the provision of the Federal Trade Commission Act declaring unlawful "unfair methods of competition in commerce" is a question of law presented for decision by this court. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993. That conduct was concerted action having for its object the putting of a ban, within the trade range of the petitioners, upon manufacturers of food products or other groceries supplying their products at jobbers' prices and terms to a dealer doing or endeavoring to do both a wholesale and a retail business; a result of the success of such concerted action being to cut off such wholesale and retail dealer from sources of supply available to dealers whose business is exclusively wholesale. The facts of the instant case are quite similar to those passed on in the case of *Eastern States Lumber Association v. United States*, supra. The just cited case was an action brought by the United States under the Sherman Anti-Trust Act (26 Stat. 209; Comp. St. §§ 8820-8823, 8827-8830), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber. It was held in that case that the circulation of a so-called official report among members of an association of retail lumber dealers calling attention to actions of listed wholesale lumber dealers in selling direct to consumers tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibition of the Sherman Act. The following are extracts from the opinion rendered in that case:

"True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers; nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. * * * A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself and may do so, because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 'when the plaintiffs in error combine and agree that no one of them will trade with any pro-

ducer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.”

The above-quoted decision is not rendered inapplicable to the facts of the instant case by the circumstances that the object of the concerted action to which the petitioners were parties was to restrict sales by manufacturers of their products to dealers who are exclusively wholesalers, instead of, as in the cited case, concerted action by retailers to prevent wholesalers selling directly to consumers, and that the methods adopted by the petitioners were different from those disclosed in the cited case. The just mentioned differences between the two cases are not material. In legal effect there is no substantial difference between a conspiracy by retailers to prevent wholesalers selling directly to consumers and a conspiracy by wholesalers to prevent manufacturers selling directly to dealers whose business includes both wholesaling and retailing. It well may be inferred that the lawmakers, in using in the Trade Commission Act the words “unfair methods of competition in commerce,” intended to include concerted action to eliminate competition, in pursuance of what amounts to a conspiracy in restraint of trade or commerce among the several states, within the meaning of the Sherman Act. *Federal Trade Commission v. Gratz*, *supra*. What the associated jobbers severally did went beyond each of them refraining altogether or to a less extent from buying from manufacturers whose products were sold directly to the Standard Grocery Company. They combined and co-operated with others to keep manufacturers willing to do so from selling their products directly to the Standard Grocery Company, and by that means to obstruct or prevent that company from competing as a wholesaler in territory sought to be appropriated by dealers not doing a combined wholesale and retail business. The combining of wholesaling and retailing is not a novelty, and is not unlawful. The success of the concerted action participated in by the petitioners meant the monopolizing of the wholesale grocery business in the El Paso territory by dealers not engaged in retailing.

We are of opinion that the practices forbidden by the attacked order were “unfair methods of competition in commerce,” within the meaning of the provision of section 5 of the Federal Trade Commission Act, because, in the circumstances disclosed, they were against the public policy evidenced by the Sherman Act. *Federal Trade Commission v. Gratz*, *supra*; *National Harness Mfrs.’ Association v. Federal Trade Commission* (C. C. A.) 268 Fed. 705.

It follows from the above-stated conclusions that the petitions should be denied; and it so ordered.

CHAPTER II

FORM OF COMBINATION

SECTION 1.—UNITY OF ACTION

ANONYMOUS.

(Leet Roll of 28 Edw. I, 1299-1300.)

Presentment in the leet of Norwich "of all the chandlers for making an agreement amongst themselves—to wit, that none of them should sell a pound of candle at less than another." (Eight persons amerced.) V Pub. of Selden Society, 52.

HEARN v. GRIFFIN.

(Court of King's Bench, 1815. 2 Chit. 407.)

Abbott, for defendant, argued in support of a demurrer to a declaration, which stated that plaintiff was the proprietor of the one coach, and the defendant proprietor of another, and that an agreement was made between them that they should not run in opposition to each other, but should each charge the same prices to passengers. This stipulation, it was urged was in restraint of that competition in trade which is so conducive to the interest of the public, and consequently was void.

ELLENBOROUGH, C. J. How can you contend that it is in restraint of trade; they are left at liberty to charge what they like, though not more than each other? and by the agreement, particular days and times for each to run in the week are fixed. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other.

Abbott then observed that there was a stipulation not to be engaged in other coach concerns, and that Fagg, of Holborn, should not have any concern in any other coach. The whole deed upon oyer was before the court, and the court will not support this contract; there is no consideration but the mutual restraint. There is no averment that they continued to run their coach. There was no partnership interest between the plaintiff and the defendant. They were proprietors of different coaches, and the covenant was in restraint of the other coach, though the party covenanting might cease to run.

BAYLEY, J. If one ceases to run, is not the contract then at an end? and if you do not perform your part of the contract you should shew your excuse. A general restraint is bad.

ELLENBOROUGH, C. J. If this argument could be sustained, then a covenant in an indenture of partnership, that neither of the parties should be engaged in any other business with any other persons, would not be good, because it might prevent the public from having the advantage of his industry in another business. Each contracting party here has one day to work his particular coach. Nor is there any limitation as to size of the coach; the defendant may have a long coach. This agreement does not preclude a third or more persons from starting in opposition to plaintiff and defendant.

This case was afterwards settled.

PHIPPEN v. STICKNEY.

(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 384.)

This was an action of debt to recover \$100 for breach of the following agreement: "Know all men by these presents, that I, Richard Stickney, in consideration that Hardy Phippen will permit me to purchase a certain piece of land, to be sold this day, bounded on said Phippen and myself, do hereby agree to purchase the said lot of land, and by this instrument do hereby agree to sell and convey to said Phippen the said piece of land on such terms as we, the said Phippen and Stickney, shall hereafter agree upon, or on such terms as the witnesses to this instrument shall decide to be just and reasonable: Said conveyance to Phippen to be made by said Stickney as soon after the sale to be made this day, as can reasonably and conveniently be made; it being understood and agreed that the said Stickney will reserve the court or passage way, and the trees on the lot said Stickney agrees to convey to Phippen and his heirs, to himself; said trees to remain on the land until the fall, or a suitable time to remove them. In default of any part of the condition of this agreement, we bind ourselves, and our heirs respectively, in the sum of one hundred dollars, to be duly paid to the injured party. Salem, May 23d, 1838. In witness whereof we this day fix our hands and seals." (Signed and sealed by both parties; and attested by three subscribing witnesses.)

The parties submitted the case to the court in these terms: "The defendant offers to prove in defence, if competent, that the contract" (above set forth) "was made under the following circumstances: One Joseph Perkins died seized of a lot of land adjoining the lands of the plaintiff and lands of the defendant. The administrator of the estate of said Perkins advertised said lot of Perkins for sale at public auction, under license from the probate court. The plaintiff and defendant entered into said written agreement. The defendant purchased the land at auction, and under said agreement; the plaintiff refraining from any bid, on account of said agreement. As soon as the defendant had received his deed from said administrator, the plaintiff demanded of

the defendant a settlement according to the terms of said agreement; but they could not agree, and thereupon the witnesses to said agreement were called together, as by said agreement is provided, and the parties had notice and appeared before the referees, or witnesses, two of whom agreed upon and signed an award, that the defendant should pay to the plaintiff \$180 for the land described and mentioned in the instrument (above set forth) signed by them. The third referee, in whose handwriting the award appears, was present, but did not agree to it, and refused to sign it. This award, the defendant refused to perform.

"If the plaintiff ought to recover, he is to have judgment for \$100, and costs, and interest; otherwise, he is to be nonsuit, and the defendant is to have costs."

DEWEY, J. The principal question in the present case is, whether the contract entered into by these parties is invalid in law, as contravening established principles of public policy, and injurious, in its tendency and effect, to the interests of those who may be concerned in sales at auction.

This subject, in another form, came before the Court of King's Bench in the case of *Bexwell v. Christie*, Cowp. 395, on which occasion Lord Mansfield expressed his opinion strongly against all secret arrangements calculated to mislead and deceive purchasers, or vendors, and requiring the strict observance of good faith and fair dealing, as essential to the validity of such sales. Upon this principle, the court in that case refused to sustain an action by the owner of property sold, against an auctioneer for selling the same to the highest bidder, contrary to his instructions from the owner not to sell below a certain fixed price. Similar views were taken in the case of *Howard v. Castle*, 6 T. R. 642, where the owner of an estate, that was offered for sale at auction, employed puffers to bid at the auction; and this was held to be a fraud upon the bidders, and as such sufficient to avoid the sale. These doctrines, to the extent to which they were carried by Lord Mansfield in *Bexwell v. Christie*, and by Lord Kenyon in *Howard v. Castle*, have been questioned in the cases of *Conelly v. Parsons*, 3 Ves. 625; *Smith v. Clarke*, 12 Bes. 477, and in *Steele v. Ellmaker*, 11 S. & R. 86, so much so that Chancellor Kent, in his *Commentaries*, vol. 2, p. 529 (4th Ed.), says, it seems to be the conclusion from the later cases, that the employment of a bidder by the owner would or would not be fraud, according to the circumstances of the case, as they tended to show innocence of intention or fraudulent design—suggesting, however, as his own opinion, that the doctrine of the earlier cases was the better one. Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, vol. 1, § 293, declares such agreement, especially in cases where the auction is one directed or required by law, to be void; being unconscientious and against public policy, and having a tendency injuriously to affect the character and value of sales at auction, and to mislead private confidence. There are some more recent English

decisions which seem strongly to countenance the general doctrine of *Bexley v. Christie* and *Howard v. Castle*; as will be seen by a reference to the cases of *Crowder v. Austin*, 2 Car. & P. 208, *Wheeler v. Collier*, 1 Mood. & Malk. 123, and *Fuller v. Abrahams*, 3 Brod. & Bing. 116, s. c. 6 Moore, 316. In the case last cited, it was held that the sale might be avoided, if the purchaser prevails on the persons attending the sale to desist from bidding by reason of suggestions by way of appeal to the sympathy of the company assembled.

In the American courts, there has also been some diversity of views upon this subject. The Supreme Court of New York have, in several reported cases, held that contracts by which one party stipulated not to bid against another at an auction sale, or an agreement by one to bid for the benefit of himself and the other party, could not be enforced in a court of law. The decisions have been usually placed upon two grounds: First, that such a contract was *nudum pactum*, being without consideration; second, that it was against public policy and a fraud on the vendor. *Jones v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112. The same doctrine, as to the effect of such contracts, was held in *Dudley v. Little*, 2 Ham. (Ohio) 505, 15 Am. Dec. 575, and in *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11,114. The case of *Gulick v. Ward*, 5 Halst. (10 N. J. Law) 87, 18 Am. Dec. 389, strongly supports the general doctrine, that such contracts cannot be enforced, as legal and valid contracts.

On the other hand, there are decisions supporting the doctrine that there may be allowed in auction sales the practice of by-bidding, if it be *bona fide*, and for the sole purpose of preventing a sacrifice of the property offered for sale. *Wolfe v. Luyster*, 1 N. Y. Super. Ct. 161; *Jenkins v. Hogg*, 2 Tread. Const. (S. C.) 821; *Chit. Con.* (4th Amer. Ed.) 238, note. In *Smith v. Greenlee*, 2 Dev. (13 N. C.) 126, 18 Am. Dec. 564, the court of North Carolina, while they sustain the general doctrine that a sale might be avoided when made to one in behalf of an association of bidders designed to stifle competition, yet concede that this rule would not apply to an association of bidders formed for honest and proper purposes, as in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeded the amount which individuals might wish to purchase on their own account.

It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor and as against public policy, merely because he who seeks to enforce the contract may have been thereby induced to abstain from

bidding. Cases may readily be imagined, and indeed are of frequent occurrence in sales of large magnitude, where two or more persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association as is just supposed, the interest of the vendor, as well as that of the vendees, would be directly advanced.

The extent, to which the doctrine of invalidating such contracts can be safely carried, would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this, the application of the principle contended for may be found productive of mischief and an unwarrantable interference with the course of business in auction sales. We are therefore of opinion, that an agreement between A. and B., that A. will permit B. to become the purchaser of certain property about to be offered at sale at public auction, and that A. shall participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article, offered for sale, below the fair market value, it will be illegal, and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding.

In the case before us, upon the facts stated, we do not feel authorized to set aside this agreement as illegal or fraudulent, upon the principles we have stated. Fraud is not to be presumed, where the contract is, on the face of it, consistent with honesty of purpose and fair dealing. If the defendant would avail himself of a defence of that character, it must be upon the finding of a jury, or upon a case stated by the parties clearly disclosing such fraudulent purpose. This contract might have been entered into by these parties, for good and justifiable reasons; and it is not therefore, to be deemed fraudulent and void upon the face of it.¹

¹ The remainder of the opinion, involving other matters, is omitted.

FLETCHER v. JOHNSON.

(Supreme Court of Michigan, 1905. 139 Mich. 51, 102 N. W. 278, 111 Am. St. Rep. 401.)

HOOVER, J. Complainant seeks by the bill in this cause the specific enforcement of a contract for the purchase, for complainant's benefit, of certain shares of stock in a corporation. The corporation referred to is the Alpena Water Company, and both parties were at the time of the transaction stockholders therein, and each was apparently desirous of obtaining a majority of the stock of the corporation. James D. Turnbull was at one time a stockholder, and owned at the time of his death 210 shares of this stock, of the par value of \$10,500. This, with other stocks, had been assigned by him to the Alpena National Bank as security for a large indebtedness. Turnbull was also indebted to defendant, Johnson, who was a director and vice president of the bank. In addition to the indebtedness mentioned, Turnbull was liable to Johnson as accommodation indorser upon paper of his held by the bank. To secure Johnson, as well as for the purpose of affording additional security to the bank, Turnbull had executed to Johnson a bill of sale covering a large amount of forest products, in trust for such purposes, which trust Johnson accepted. The complainant asked the bank to give him notice when it should determine to dispose of the water stock.

About December 1, 1901, the board of directors of the bank considered the steps necessary to be taken in order to foreclose and cut off the equity of the Turnbull estate in these stocks to enable it to realize thereon in payment of its claims, and it was decided that the stocks should be offered at public sale, the proceeds to be accounted for to the estate after satisfying the obligations. Upon learning this the complainant telephoned Johnson to call upon him, and an interview was had, at which complainant told him that he knew that the complainant wanted to obtain this stock, and asked what they better do, and whether he should "go in there and bid against him" (Johnson). This resulted in an agreement that, if complainant would not bid against Johnson, the latter would buy the stock from the bank, one-half on complainant's account. The stock was not sold at public sale, but Johnson obtained the bank's interest, and afterwards adjusted the matter with the estate in a way to perfect his title to this stock. Complainant gave him his check for half of the cost of his purchase, and defendant accepted it, though he afterwards returned it, and refused to give complainant any of the stock. Upon hearing the cause, the court dismissed the bill, holding that the contract between the parties was opposed to public policy, and void. The complainant has appealed.

The evidence fairly shows that each of these persons desired the stock, or at least that the other should not have it all. Apparently it was a question of control of the company. To avoid competition between them, they agreed that one should bid for both, and that there

should be no bidding against each other, and that the stock should be divided and the expense shared equally. The question is resolved into this: May two persons, who desire to purchase the same property, which is to be offered for sale, agree between themselves that one shall purchase for the benefit of both, thereby preventing competitive bidding between themselves? The authorities are, perhaps, not in entire harmony upon this subject, but there is a near approach to uniformity upon the proposition that when the object of the contracting parties is to prevent competition at the sale, to the end that the property may be bought for less than its value, the contract is void. The cases cited by the complainant's counsel do not question that rule. The only reason that can be given for its nonapplication to the present case is that the parties did not design to buy the property for less than its value; in other words, it was their design to avoid paying an exorbitant price, liable to be bid by reason of their respective interests and necessities.

We think that the cases cited by counsel do not establish such a distinction, for none of them turn upon that point alone. The validity of the contract cannot depend on the price paid at the sale, but must rest on the terms of the agreement. Here no price was agreed upon to be bid, nor is there anything to indicate that each party did not desire to buy as cheaply as possible. The only inducement to the contract was a prevention of competition, which was expressly agreed upon. In the case of *Fisher v. Hampton Transportation Company* (Mich.) 98 N. W. 1012, a similar promise was held void on the ground that it was contrary to public policy. That case recognizes the rule that, where the circumstances show that the consideration for the promise is, in whole or in part, an attempt to prevent competition at a public sale, the contract is void. That was the express consideration here.

Upon the hearing the testimony showed certain conduct and conversations by and between these parties relating to the delivery and reception of the check, and counsel for the complainant claimed that a new contract was inferable therefrom, and amended his bill to conform to such claim. Upon an examination of the proof we are unable to find any intention on the part of Johnson to make a new contract. If at that time he accepted the check with an intention to deliver the stock, it was, in our opinion, a mere carrying out of the original contract. Even if we could assert the fiction of a legal inference against what we believe the proof shows to have been the fact, it would be an extraordinary spectacle for a court of equity to endeavor thus to avoid the consequences of an illegal contract, so far carried out as to have effected the object of preventing competition. The proof would have to be pretty clear to divorce the subsequent transactions from the earlier, and justify the conclusion that an entirely new and distinct contract was in contemplation by the parties, in no part resting upon the illegal consideration.

We are of the opinion that the learned circuit judge was right in his conclusion that the complainant could not be granted the relief sought. The decree is affirmed, with costs.

CRAFT v. McCONOUGHY.

(Supreme Court of Illinois, 1875. 79 Ill. 346, 22 Am. Rep. 171.)

Mr. Justice CRAIG delivered the opinion of the court.

This was a bill in equity, brought by James O. McConoughy against Richard C. Craft and others, for an account and distribution of the profits of an alleged partnership claimed to have existed under a written contract, to the following effect:

"Articles of agreement made and entered into this 20th day of April, A. D. 1869, between the following persons, viz. E. P. Sexton, Dr. John McConoughy, C. B. Boyce, R. C. Craft and William Wiswell, for the purpose of systematically pursuing the grain trade in Rochelle, and for mutual protection against losses. The said parties covenant and agree to enter into the grain trade for one year from this date, upon the following terms: Our several grain houses shall be put into the business upon the basis of twenty-seven shares as the aggregate, divided as follows: C. B. Boyce and R. C. Craft shall be entitled to nine shares, E. P. Sexton to six shares, J. McConoughy to six shares, and William Wiswell to six shares. Each separate firm shall conduct their own houses as heretofore, as though there was no partnership in appearance, keep their own accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with; a list of all the grain purchased by each firm to be made every day and handed to the general bookkeeper, with amounts paid for the same; also every car shipped to be reported at the time, and every account of sale to be handed in to said bookkeeper, as well as all sales made at the warehouse from time to time. It shall be the duty of the bookkeeper to make a faithful record of all the grain bought by each party, the amount of money paid for the same, and place to his debit, and also to credit him with all account of sales, as well as any transactions made at the warehouse, and, at the end of every month, each individual's account to be balanced, showing the profits or loss, which amount is to be divided pro rata, according to the number of shares held by each party. It is further agreed, that there shall be no grain held for advance in price, or for any other cause, by any of the above-named parties.

"Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and a half cents per bushel, monthly; but if sold inside of thirty days, no storage to be asked. No grain to be shipped by any party at less than two cents per bushel."

In November following the execution of the agreement, John McConoughy died, and it is the theory of the bill that the complainant, who was his son, by mutual consent came in and took his place under the contract.

It is set up in the answer, that the contract was made in restraint of trade, and is against public policy, and void; that all transactions with complainant or with his father and defendants, under or in pursuance of it, and under the alleged arrangement with complainant after the death of his father, were in restraint of trade, against public policy, and void.

Two questions arise upon the record: First, whether the contract set out in the bill is void. Second, if illegal and void, will a court of equity, after it has been executed, require one of the parties to account to another for a portion of the gains arising under the contract?

Prior to and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others leased, so that the combination formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market.

Secret meetings were held in the nighttime by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination.

To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other.

The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show: "Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with." * * * "Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel, monthly." * * * "No grain to be shipped by any party at less rates than two cents per bushel."

While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage,

and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country.

That the effect of this contract was to restrain the trade and commerce of the country, is a proposition that can not be successfully denied.

We understand it to be a well settled rule of law, that an agreement in general restraint of trade, is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable.

This subject was ably discussed in the leading case of *Mitchell v. Reynolds*, 1 P. Williams, 181 (see, also, 1 Smith's Lead. Cases, 172, and notes), and the rule of law established, which has been followed and adhered to in numerous cases since.

In reference to the point, what might be regarded a reasonable restriction, numerous cases might be cited, but what was said in *Horner v. Graves*, 7 Bing, 735, will illustrate the principle. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either. It can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interest of the public, is void, on the ground of public policy."

If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it can not be sanctioned in a court of equity.

While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159.

It is, however, insisted that, even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account.

The rule is, however, well settled in this State, that a court of equity will not lend its aid in the division of the profits of an illegal trans-

action between associates. *Neustadt v. Hall*, 58 Ill. 172; *Skeels v. Phillips*, 54 Ill. 309; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597.

The complainant and the defendants were equally involved in the unlawful combination. A court of equity will assist neither.

The decree will be reversed and the cause remanded.

Decree reversed.

COLLINS v. LOCKE.

(Privy Council, 1879. L. R. 4 App. Cas. 674.)

The Judgment of their Lordships was delivered by Sir MONTAGUE E. SMITH:²

The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of Melbourne for regulating and distributing among them the stevedoring of ships in that port.

By the deed, which contains the agreement, the four parties to it, viz., the firm of George Washington Robbins and Francis Robbins Collins (the defendant in the action and the present appellant), Alfred John Johnson, and Locke (the plaintiff, and the respondent in this appeal), covenanted with each other, first, that "as between the parties" Messrs. Robbins should "be absolutely entitled to the business of stevedoring all ships which should arrive in the port of Melbourne consigned to the firm of Dalgety, Blackwood & Co.," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the defendant to those consigned to J. H. White & Co., Johnson to those consigned to MacFarlane & Co., and the plaintiff to those consigned to Holmes, White & Co., R. Towns & Co., and King, Meng & Co., and that the parties should be absolutely entitled for their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows: "And neither of them the said several parties hereto shall not (sic), nor will, save as hereinafter expressly provided, undertake or be in any way concerned in or interfere in the stevedoring, either in whole or in part, of any ship or vessel consigned to any of the said persons or firms hereinbefore particularly mentioned otherwise than according to the provision in that behalf hereinbefore contained."

The second and third clauses of the deed are in the following terms:

"2. That if any or either of the said firms hereinbefore named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause

² The opinion only is given.

shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. James Allison Crane, and an umpire to be named by such arbitrators, in case they disagree.

"3. That the stevedoring of all ships not consigned to any of the hereinbefore mentioned firms shall be taken and stevedored in the following order; that is to say, the first ship to arrive after the date hereof to be stevedored by the said John Kindlan Collins, the second by the said Francis Robbins, the third by the said George Washington Robbins, and the fourth by the said Alfred Joseph Johnson, and so on in such order during the continuance of these presents, it being expressly agreed that the said James Locke shall not be entitled to the stevedoring of any ships or vessels save those consigned to the said firms of Holmes, White & Co., R. Towns & Co., and King, Meng & Co."

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships, and in case any firm should cease to carry on business, the party losing such firm should be entitled to make a selection of another firm in Melbourne, subject to arbitration in case of disagreement.

The ninth clause is a covenant for the payment of £1,000 as liquidated damages for the breach of any of the covenants, and the tenth contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the plaintiff, was dissolved, and a new firm, Stewart, Couch & Co., succeeded to its business, and was selected by the plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the plaintiff's counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the plaintiff had selected Stewart, Couch & Co., in the place of R. Towns & Co., that certain ships arrived in Melbourne consigned to Stewart, Couch & Co., and that although that firm did not refuse to allow the stevedoring of these ships to be done by the plaintiff, yet the defendant did the stevedoring of them, whereby the plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor award made. The fourth sets out the deed at length, and avers that there was no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the plaintiff selected Stewart, Couch & Co. in place of R. Towns & Co.; and the last plea avers that the other parties to the deed did not agree to such selection.

The plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships, the Jason, Clara, and Eastern Monarch, as having been stevedored by the defendant in breach of the agreement, but it has been admitted that the action is not maintainable in respect of the Jason.

The evidence given at the trial was short and meager. The following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this appeal.

The Clara arrived at Melbourne consigned to Stewart, Couch & Co. No question arises upon the unloading, which was done by the plaintiff. The Clara then passed out of the hands of Stewart, Couch & Co. into those of Poole, Picken & Co., who employed the defendant to stevedore her for the outward voyage, which he did.

The Eastern Monarch also arrived at Melbourne consigned to Stewart, Couch & Co. The defendant both loaded and unloaded her. Stewart, Couch & Co. had nothing to do with the stevedores. This ship also passed into the hands of other merchants, viz., Bright and J. H. White, who employed the defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the plaintiff, with the following damages, viz.: £125 for the Clara; and £155 for the Eastern Monarch. A rule nisi was obtained to set aside the verdict and enter it for the defendant, on the ground that the third plea was proved, or to reduce the damages to £20, on the ground that under the terms of the agreement the plaintiff was only entitled to recover the profit of unloading the Eastern Monarch.

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above rule, and has also given judgment for the plaintiff upon the demurrers to the third and fourth pleas.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are "those which shall arrive in the port of Melbourne consigned to particular firms." This language is apparently used to describe the class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shewn to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the plaintiff, who insists on the construction which enables him, if the action is otherwise maintainable, to retain the full amount of damages awarded by the jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also it may be to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to *Mitchel v. Reynolds* in the first volume of *Smith's Leading Cases*. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The courts are not disposed to measure the adequacy of the consideration, if a real and bona fide consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by Lord Ellenborough, in delivering the judgment of the court in *Gale v. Reed*, 8 East, 86: "The restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other." He went on to say: "As the carrying the restraint further would be arbitrary and useless between the parties, a construction which would have that effect must be reluctantly resorted to," and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of *Horner v. Graves*, 7 Bing. 743, Tindal, C. J., in delivering the judgment of the court, said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of *Mallan and others v. May*, 11 M. & W. 653. There by a deed under which the defendant became assistant to the plaintiffs in their business of surgeon dentists, he covenanted that he would not carry on that business in London, "or in any of the towns or places in England or Scotland where the plaintiffs might have been practicing before the expiration of the defendant's service." The declaration contained two breaches; the first for practising in London, the second for practising in another place where the plaintiffs had practised. The court adopted the principle of the decision in *Horner v. Graves*, 7 Bing. 743, and holding the contract to be divisible, decided that the prohibition against practising in London was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the plaintiffs required, and was therefore, an un-

reasonable restriction. The court accordingly gave judgment for the plaintiffs on the first breach, and for the defendant on the second. The principles on which this case was decided were upheld by the Exchequer Chamber in *Price v. Green*, 16 M. & W. 346.

Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz. that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by clause 2 as regards the original consignees, and therefore in the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is, that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work; in the words of Mr. Justice Fellows such ships are, "so to speak tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above-mentioned consequences is that on which the plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon the second clause of the agreement, because Stewart, Couch & Co. did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the court below in dealing with the second breach, the action will not lie under clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was held to be void in *Hilton v. Eckersley*, 6 E. & B. 47, 67; whilst it cannot be justified on the ground upon which Mr. Justice Erle (who differed from the majority of the court) thought the contract in that case might be supported, viz. that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interest as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the courts to enforce it. They have already said that this objection does not apply to clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the defendant as to the first and third breaches, but for the plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lordships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration clause (clause 11) affords an answer to the action, there having been no arbitration and no award under it.³

In the result, their Lordships are of opinion that the rule nisi, so far as it prays to enter the verdict for the defendant on the first and second breaches, should be made absolute, and as to the rest should be discharged; that the judgment for the plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the

³ The part of the opinion bearing on this question is omitted.

plaintiff on the demurrer to the fourth plea should be reversed as to the first and third breaches, and judgment entered as to these breaches for the defendant, and they will humbly advise Her Majesty accordingly.

The appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the cost of this appeal.

URMSTON v. WHITELEGG BROS.

(Queen's Bench Division, 1890. 63 L. T. R. [N. S.] 455.)

The action was brought by the plaintiff, as treasurer of the Bolton Mineral Water Manufacturers' Association, of which the defendants were members, for a penalty incurred under the rules. By the rules, which recited that the object of the association was to maintain the price of mineral water, the members bound themselves not to sell at a less price than 9d. per dozen bottles, or such other price not less than 9d. as the committee might from time to time direct. The arrangement was to continue in force for ten years, and for every contravention of its provisions a penalty of £10. recoverable in the County Court was to be incurred.

The defendants wished to retire from the association, and commenced selling mineral waters at 8d. per dozen bottles. This action was accordingly brought for the penalty provided by the rules of the association. The County Court judge decided in favour of the plaintiff, and the defendants appealed.

DAY, J. This action is brought by the plaintiff, as treasurer of the Mineral Water Manufacturers' Association of Bolton, to recover a penalty on behalf of that society, of which the defendant is a member. The association's memorandum of agreement recites the excessive competition and the consequent cutting down of prices, from which its members suffer, and the object of its existence is to obtain higher prices; for which purpose all the members pledge themselves to obey the rules. Each member joining the association agrees to abide by the price of 9d. per dozen, or any price not less than 9d. per dozen that the association may direct. Liability is to last for ten years from the date of joining the association, and a penalty of £10. is to be incurred for every contravention of the rules. It might have been contended that no penalty was recoverable on such an agreement; but the point was not taken at the County Court, and is not raised by the notice of motion here. The only question is, whether the agreement can be enforced, as between the members of the association themselves. It is said it is bad as being in restraint of trade. If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years

great changes have taken place in the views of the public, of the Legislature, and therefore of the judges, on the matter, and many old-fashioned offences have disappeared; but the rule still obtains that combination for the mere purpose of raising prices, is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable; it is not necessary that it should be such as to form the ground of criminal proceedings.

Our attention has been called to the case of *Wickens v. Evans*, 3 *Yo. & Jer.* 318, in which three persons carrying on the trade or business of trunk makers, and travelling by themselves and their servants into various parts of England, to vend trunks and boxes, agreed to divide, and each of them to pursue and carry on his business within one appointed district wherein he had a connection, and not to interrupt, interfere, or compete with either of the other two in the districts allotted to them. There was there no scheme for limiting supply or altering prices in any way, and there is no objection to such an agreement. But this is a very different case; for ten years the price is to be kept up, and no mineral water is to be sold by any member of the association, during that period, at a less price than 9d. a dozen. It may be said that other persons might come and set up business in opposition to the members of this association; but that does not alter the fact that the whole gist and object of the arrangement was to raise the price of soda-water without any legitimate consideration whatever. No matter what the ultimate consequence may be, this is the direct object. Then there is no consideration; it is said that each would get the benefit from the concurrence of the rest. That may be, but that is no consideration. Take the case of a person who is taught the mysteries and secrets of a trade, and undertakes not to take advantage of the knowledge imparted to him to the detriment of his teacher; that is an enforceable contract because it has an adequate consideration. The same principle applies to other cases where the contract is *prima facie* in restraint of trade, but is enforceable because, and up to the extent, of the consideration. Here there is no consideration; the gist of the agreement is to raise the price; it is a mere scheme for putting into the pockets of the Bolton manufacturers the money extracted from soda-water consumers; it is without consideration, and cannot be enforced against the defendant.

LAWRANCE, J., concurred.

Appeal allowed.⁴

⁴ The Court of Appeals dismissed the appeal solely on the ground that the contract was unreasonable. 55 *J. P.* 453.

EMERY v. OHIO CANDLE CO.

(Supreme Court of Ohio, 1890. 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819.)

Error to Superior Court of Cincinnati.

In 1880 an unincorporated company was formed, to continue six years, called the "Candle Manufacturers' Association," which included the manufacturers of 95 per cent. of the star candles in that part of the United States lying east of the 114th deg. of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement; and it is found, as a fact, to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one-half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and, whether he did or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years; thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low. The receipts of the association were placed in a selected depository, the First National Bank of Cincinnati, to the credit of an executive committee, consisting of three members, selected by the association, and could only be paid out on a check signed by at least two of them. The claims of all members were adjusted by this committee.

The Ohio Candle Company, incorporated under the laws of this state, joined the association in 1883, and withdrew therefrom in March, 1884. During the month of January of that year it had paid into the association \$22.40, but there was due to it, under the terms of the agreement, as profits for that month, the sum of \$2,151.17. The committee agreed to pay the company the sum it had paid in, but refused to pay the sum due as profits, on the ground that, by withdrawing before the expiration of the life of the association, it had violated the agreement, and was entitled to none of its gains. Thereupon the company brought suit for the amount against the members composing the committee, to which the bank was made a party, asking that the bank be ordered to pay the money to the plaintiff, or that a judgment be rendered in its favor for the amount with interest. Issues of fact having been made up, the case was tried to the court, and reserved for hearing in general term, which made a finding of facts,—the substance of which has been stated,—and rendered judgment against the members of the committee, which is sought to be reversed on the ground that it is against the law.

PER CURIAM. We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary

to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defense, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill gotten gains.

The case of *Norton v. Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement. See *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 6 South. Rep. 888, where *Brooks v. Martin*, 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.

Judgment reversed, and petition of plaintiff below dismissed.

SWIFT & CO. v. UNITED STATES.

(Supreme Court of the United States, 1905. 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.)

Mr. Justice HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the Act of July 2, 1890 (26 Stat. 209, c. 647, U. S. Comp. Stat. 1901, p. 3200), "to protect trade and commerce against unlawful restraints and monopolies." It will be necessary to consider both the bill and the decree. The bill is brought against a number of corporations, firms, and individuals of different states, and makes the following allegations:

(1) The defendants (appellants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis, and St. Paul, and slaughtering such live stock at their respective plants in places named, in different states, and converting the live stock into fresh meat for human consumption.

(2) The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to deal-

ers and consumers in divers states and territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the same meats, when so sold, from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales."

(3) The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other states, etc., for sale by those agents in those markets to dealers and consumers.

(4) The defendants together control about six tenths of the whole trade and commerce in fresh meats among the states, territories, and District of Columbia, and,

(5) but for the acts charged would be in free competition with one another.

(6) In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring, and do and will require, their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other states and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

(7) For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other states to make large shipments to the stock yards, to their disadvantage.

(8) For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time, raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the states. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another of the delinquencies of such dealers, and keeping a black list of delinquents, and refusing to sell meats to them.

(9) The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the states, etc., shipped to them by the defendants

through the defendants' agents at the markets, when no charges would have been made but for the combination.⁵

There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.⁶

To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to which we shall refer, we think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the eighth section of the bill as to raising, lowering, and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But, after all the specific charges, there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meat throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge, and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth suffi-

⁵ The remaining allegations are omitted.

⁶ This note is omitted.

cient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 25 Sup. Ct. Rep. 3, 49 L. Ed. 154. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.⁷ * * *

For the foregoing reasons we are of opinion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the states

⁷ Much of the discussion as to whether the scheme affected interstate commerce is omitted.

or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the 6th section. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different states from either. The intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the states. * * *

We are of opinion, further, that the charge in the sixth section is not too vague. The charge is not of a single agreement, but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other states to the stock yards for sale, or is bought at those yards for transport to another state.

After what we have said, the seventh, eighth, and ninth sections need no special remark, except that the cartage referred to in section 9 is not an independent matter, such as was dealt in in *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. Ed. 325, 24 Sup. Ct. Rep. 202, but a part of the contemplated transit—cartage for delivery of the goods. The general words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid. To the same end of definiteness, so far as attainable, the words "as charged in the bill," should be inserted between "dealers in such meats," and "the effect of which

rules," and two lines lower, as to charges for cartage, the same words should be inserted between "dealers and consumers" and "the effect of which."⁸

Decree modified and affirmed.

SKRAINKA v. SCHARRINGHAUSEN.

(St. Louis Court of Appeals, 1880. 8 Mo. App. 522.)

BAKEWELL, J., delivered the opinion of the court.

On March 19, 1878, defendant, with twenty-three other persons, owners and operators of stone-quarries in that part of the city of St. Louis lying south of Market street and Manchester road, signed an agreement, in which they set forth that the great competition then existing had had the tendency of depressing the price of building rock in the city so as to make it impossible to work quarries at a profit in certain parts of the city; and that, it being desirable to agree on a plan which will secure a fair, proportionate sale of the produce of all quarries at uniform prices and living rates, they mutually bind themselves as follows:

(1) That none of the subscribers will, for a period of six months from date, sell any rubble building stone, the produce of any quarry in St. Louis south of the line named above, except as set forth in the agreement. (2) An exclusive agent is appointed for the period named, to sell on account of the contracting parties all the rubble building stone of said quarries, giving to each quarry its proportionate share, taking into consideration its location and producing capacity; and the agent is instructed, until otherwise directed by the committee afterwards named, to sell the rock at prices set out in the instrument for various qualities of stone. (3) An executive supervisory committee of five is appointed to see that the agent deals fairly with each quarry, to modify the scale of prices, and to hear and settle complaints. (4) The sum of \$100 is fixed as liquidated damages for each violation of the agreement; and each sale of one hundred perches, or less, of rock is to be held as a separate offence.

Skrainka, the plaintiff in this case, is appointed trustee to sue for the damages, and to distribute the amount recovered amongst the parties to the agreement, excluding the offending member. A percentage on sales is to be paid to the treasurer for the expenses of the association. The agent is to keep a record of sales, and to measure the rock and collect for the member furnishing any stone sold; and if any mason or building contractor fails to pay for stone purchased within fifteen days from presentation of his bill, no more is to be furnished him. A percentage on sales is fixed as a compensation for the agent,

⁸ The remainder of the opinion, dealing with the charge of procuring discrimination among railroads, is omitted.

and it is provided that he shall give security for the discharge of his duties.

Defendant was sued before a justice for \$100 damages for violation of the agreement. On trial anew in the circuit court, there was judgment for plaintiff.

There is no dispute as to the facts. Appellant contends that the agreement was against public policy, in restraint of trade, and not enforceable at law. This agreement does not, upon its face, purport to be in restraint of trade, nor does it appear that such must necessarily be its operation. The recital is, rather, that it is to advance trade; because, if competition reaches such a point that goods cannot be sold at living prices, many manufacturers must be driven out of business. But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages industry, diminishes production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry and engrosses the markets—tends to “make a corner,” to use the slang of the stock and provision gamblers—it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time, and persons, are not necessarily restraints of trade in the general sense which is objectionable. *Alger v. Thacher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119.

The old doctrine of the common law, that contracts in restraint of trade are void, is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system and the changes which have been introduced in the social system. *Presbury v. Fisher*, 18 Mo. 50; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355. It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade. When the avenues to trade and employment were impeded by artificial barriers, so that if one engaged not to practice his craft, no other occupation was free to him, and he was likely to remain an idle and useless, and to become a dangerous member of society, the court looked with grave displeasure upon any agreement by which one bound himself not to exercise his trade or mystery (to use the old phrase); but with greater freedom there came an opinion that such contracts were not necessarily in restraint of trade or an injury to the public.

But, so far as the odious nature of monopoly is concerned, that, as observed in *Wiggins Ferry Co. v. Railroad Co.*, 5 Mo. App. 373, has become more apparent as commerce has increased. The danger to be apprehended from the accumulation of wealth and power in the hands

of great corporations, and the abuses by which large capitalists may so combine as to relax or destroy competition in trade, are matters of public concern, and the essential question is one of monopoly and of injury to the public [citing and reviewing *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Morris Coal Co. v. Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159; *Arnot v. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Stanton v. Allen*, 5 Denio (N. Y.) 435, 49 Am. Dec. 282.] And these cases are good illustrations of the doctrine that a general restraint upon trade is void on the ground of public policy, as being injurious to the public interest. But where the restraint is partial and the restriction reasonable, and such as affords a fair protection to those in whose favor it is made, and it is not so large as to interfere with the interests of the general public, it need not be against the policy of the law.

The partial nature of the restraint in the case before us seems to be not colorable, but real. The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. There is no evidence that it works any public mischief, and the contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition. It is limited both as to time and place; and we know of no case in recent times in which a contract such as the one before us has been declared illegal. In *Hilton v. Eckersley*, 6 El. & Bl. 47, an agreement by which all the master-manufacturers in a large district, embracing two populous towns in England, were obliged for a year to carry on their trade as the majority might direct, and might be compelled to shut up their manufactories and dismiss their hands, even though that action should be against the interests of individual members of the association and of the manufacturing community, was held void notwithstanding the limitation. But the result seems to be reached with hesitation, and there is a strong dissenting opinion in the case.

We are of opinion that the agreement in the present case is not one which clearly, upon its face, is mischievous, and which ought to be declared void, with a view to protecting individuals or the general public.⁹

The judgment is affirmed.

CUMMINGS v. UNION BLUE STONE CO.

(Court of Appeals of New York, 1900. 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655.)

Action by James V. Cummings against the Union Bluestone Company and others to recover damages alleged to have been sustained by plaintiff as the result of a conspiracy between defendants to abrogate a contract creating a combination to control the price of bluestone.

⁹ The remainder of the case, relating to a question of jurisdiction, is omitted.

From a judgment of the Appellate Division (44 N. Y. Supp. 787) affirming a judgment in favor of defendants, plaintiff appeals.

LONDON, J. The trial court, in directing a verdict for the defendants, held that the contract for the alleged violation of which by the defendants the plaintiff sought to recover damages was a combination to control the market of bluestone and the market price, and to increase the market price, and maintain it at the increased price, and was, therefore, void. The evidence was to the effect that in 1887 the plaintiff and 14 other persons were the producers of nearly the whole product of Hudson river bluestone, and of at least 90 per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river; that their yearly sales amounted to upwards of \$1,500,000; that, owing to competition among themselves, their profits had for some time been practically nominal; that, with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into an agreement bearing date the 21st day of February, 1887, with the defendant the Union Bluestone Company, and thereby agreed that the said company should act as their sales agent of all the marketable bluestone, manufactured and unmanufactured, which the market would take for the six years from that date at prices to be fixed by the Bluestone Association, composed of the said producers, and to apportion the sales among the producers according to a schedule set forth in the contract, and to sell for no other parties, the producers agreeing to sell no stone except through such agent, and, acting as the Bluestone Association, to fix the prices, and each to furnish, upon the request of the sales agent, his quota of stone as apportioned.

This contract was observed by the parties for about three years. The prices were increased, the sales aggregated about \$1,500,000 per year, and the plaintiff's share of the profits was satisfactory to him. By the end of three years, competition in other kinds of stone and in artificial stone had so far developed as to threaten, in the opinion of the greater part of the producers, not including the plaintiff, further successful operation under the contract, and they resolved to discontinue operations under it, with the result to the plaintiff that he took no further benefit under it. The plaintiff meantime had assigned his interest under the contract and certain bluestone and other property to the defendants Sweeney in consideration of their payment to him of 10 per centum of their gross amount of sales under the contract. The plaintiff charges that the bluestone company and his assignees, the Sweeneys, combined together to prevent any further delivery and sales upon his account under the contract, and thus deprived him of any further profit.

The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear; and, as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great. The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts, do anything to injure what he sells.¹⁰

Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and, but for this monopoly, obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations. All are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy, and are void. *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *Arnot v. Coal Co.*, 68 N. Y. 558; *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 4 Denio, 349; *People v. Fisher*, 14 Wend. 9.

It is urged that the rule is only applicable to articles of prime necessity. Cases of criminal conspiracies to commit any act "injurious to trade or commerce" (Pen. Code, § 168; 2 Rev. St. p. 692, § 8, subd. 6) have been more frequent in commodities of prime necessity, such as grain, meat, salt, milk, coal, and the like, probably because such offenses are more flagrant, and were punishable at the common law. We are not now reviewing a conviction for crime, and need not inquire whether, in any criminal element, the case differs from *People v. Sheldon*, supra. The subject-matter of the contract before us is a useful commodity of a nature to be needful for many purposes. Without considering the question whether there are many articles of commerce which

¹⁰ These cases and the comment thereon are omitted.

are in no proper sense necessities, or even conveniences, but mere luxuries, or appendages of vanity, a monopoly in which does not conflict with the spirit of any statute, or with the sound public policy which the statute cited declares, it is clear that the bluestone in question is not within any of such classes. It is abundant in the foothills of the Catskill Mountains, and not found of equal quality elsewhere. When this contract was made there were many small producers who supplied it to these parties, but were themselves without means or facilities to reach the New York market. The stone had been for many years, and still is, in use for sidewalks, crossings, curbings, and gutters in the Eastern and Southern cities of the United States, and in the construction of bridges, fountains, basins, floors, and for trimmings in the exterior walls of buildings, and for various other purposes. Its fitness and serviceability for these purposes were shown, and the evidence also tended to show that in these respects it had no superior in the New York market.

In a civil action prime necessity need not be shown. The parties to this contract controlled 90 per centum of a total product of about \$2,000,000 in value, marketed in New York City. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights if constrained by a monopoly to pay an exorbitant price for it, or to accept another kind which he did not want. The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law. The trial court was also right in holding that the plaintiff had made no proof of his special charge against these defendants of a fraudulent breach of the contract as to his alleged interest in it.

The judgment should be affirmed, with costs.

CENTRAL SHADE-ROLLER CO. v. CUSHMAN.

(Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 353, 9 N. E. 629.)

Bill in equity for an account, and for an injunction to restrain the defendant from violating an agreement made by him with the plaintiff. Hearing in the supreme court on the demurrer of the defendant, before Devens, J., who sustained the demurrer, and the plaintiff appealed. The facts are stated in the opinion.

W. ALLEN, J. The contract which is sought to be enforced by this bill (and the validity of which is the only question presented by the demurrer and argued by the parties) was made between the plaintiff, of the first part, and three manufacturers, under several patents of certain curtain fixtures known as "Wood Balance Shade Rollers," of the second part, in pursuance of an arrangement between the persons forming the party of the second part that the plaintiff corporation

should be created for the purpose of becoming a party to the combination, was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made. This is a lawful purpose, but it is argued that the means employed to carry it out—the creation of the plaintiff corporation and the terms of the contract with it—are against public policy and invalid. The fact that the parties to the combination formed themselves into a corporation of which they were the stockholders, that they might contract with it, instead of with each other, and carry out their scheme through its agency, instead of that of a pre-existing person, is obviously immaterial, and the only ground upon which it can be argued that the contract is invalid is the restraint it puts upon the parties to it.

Does the contract impose a restraint as to the manufacture on the sale of balance and shade rollers which is void as against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon and offers no inducement to any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production. The contract does not restrict the sale of the commodity. It does not look towards withholding a supply from the market in order to enhance the price, as in *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, and other cases cited by the defendant. On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so; the only restrictions being that sales not at retail or for export shall be in the name of the plaintiff, and reported to it, and the accounts of them kept by it; and the provision that, when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, there is added the one which affords an argument for the invalidity of the contract—the restriction as to price. That restriction is, in substance, that the prices for rollers of the same grade, made by different parties, shall be the same, and shall be, according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three-fourths of its stockholders. In effect, it is an agreement between three makers of a commodity that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside—the parties have a monopoly by their patents—but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make.

To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry.

But we cannot assume that the purpose and effect of the combination is to unduly raise the price of the commodity. A natural purpose and a natural effect is to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and consumers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy. We have not overlooked other provisions of the contract, which were adverted to in the argument, but we do not find anything which renders it invalid, or calls for special consideration.

In the opinion of a majority of the court, the entry must be, demurrer overruled.

GEO. BIRRELL, Inc., v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Iowa, 1922. 188 N. W. 26.)

Suit against a fidelity insurance company on a bond given to indemnify the plaintiff against loss by reason of the wrongful abstraction of its funds by its manager. The manager intervened and was also made a party defendant by amendment to the petition. The cause was tried to the court without the intervention of a jury, and judgment was rendered, dismissing plaintiff's petition, and it appeals.

ARTHUR, J. The appellant is a corporation organized under the laws of the state of New York, and authorized to transact business in Iowa. Its office and principal place of business is at Muscatine. The general nature of its business is that of buying, handling, and selling mussel shells, which are gathered from the waters of the Mississippi river and its tributaries, and are used in the manufacture of pearl buttons.

Prior to the 26th of March, 1917, the appellee George Birrell was the sole owner of all of the stock of said corporation. The record discloses that at that time there were a large number of corporations, firms, and individuals located in different parts of the United States who were engaged in the manufacture of pearl buttons from mussel shells. In the spring of 1917 representatives of certain of these institutions approached the appellee Birrell with a proposition to enter into a business arrangement by which the various manufacturers of pearl buttons should secure the supply of mussel shells, needed by them in their business, through the appellant corporation, and that the latter should secure said shells from numerous shell diggers, or producers, who gathered the same from various streams.

It also appears from the evidence that prior to said time the parties interested in the manufacture of pearl buttons had secured a monopoly of the Barry automatic machine, which is a machine used in the manufacture of pearl buttons, and is considered the most efficient machine of that character.

Meetings were held between the appellee Birrell and the representatives of the various concerns interested in the project. In the latter part of March, 1917, an arrangement was entered into between these various parties and Birrell for the carrying out of the proposed plan of operation.

As a part of the general arrangement, a written contract was made between the appellant corporation and the appellee Birrell, who, as before stated, was at said time the sole owner of the stock of the appellant corporation. This contract provided that Birrell was to be manager of the corporation and assume personal charge of the business of buying and handling mussel shells, and was to devote his entire attention to said business during the season of 1917. It was also provided in said contract that—

"In the matters of general policy he [Birrell] will solicit and receive suggestions and advice of the board of directors of said company, who have supervision of the affairs of the company, and any radical departure from the established methods is to be first approved by said board of directors. The plan of course of business of said corporation prepared in written form and adopted at this time is to be observed. He will make report of the business of said corporation to said board when requested. He shall give bond for the faithful performance of his obligations hereunder, and as such president and manager under the articles and by-laws of said corporation, in the sum of twenty-five thousand dollars (\$25,000) to be underwritten by approved surety company and premium to be paid by said corporation."

Various provisions are made in said "plan" in regard to the general manner of conducting the business.

Two proposed forms of contract were agreed upon to be entered into between the appellant corporation and the various concerns engaging in said arrangement. One was a contract for the purchase of shells by the manufacturer from the appellant corporation at and for the prices stated in a schedule attached to the contract. The other contract recited that, in view of the purchase by the manufacturer of mussel shells from the Birrell, Irby, Company, the purchaser was to receive certain benefits in distribution of the profits of said corporation. This contract provided that at the close of the season the Birrell Corporation should pay to the purchaser of shells "a sum of money bearing such proportion to the total net profits of said corporation made and earned during the said shell-buying season of 1917, as the total value of shells sold and delivered to said purchaser by said

corporation during said season, bears to the total value of said shells sold to all its purchasers by said corporation during said season."

This contract also provided that to secure the performance of this agreement certain certificates of the capital stock of the corporation were to be deposited in trust with a trustee, with the power vested in him thereunder to require of the said corporation and its officers the performance of the profit-sharing contract. These two forms of contracts were adopted for the purpose of carrying out the general scheme entered into between the parties, and were used between said parties during the season of 1917. Birrell was to be paid a salary of \$5,000 and traveling and business expenses.

After this arrangement had been consummated, Birrell entered upon his duties as manager of the appellant corporation, and furnished to said corporation a bond, executed by the appellee, Fidelity & Casualty Company, as surety, in the principal sum of \$25,000. Said bond is in the usual form of obligations of this character, and indemnifies the appellant, as an employer, against loss through the fraud, dishonesty, forgery, theft, embezzlement, or wrongful abstraction of the employee.

The appellant contends that while engaged under his said contract of employment Birrell wrongfully abstracted and withdrew funds and property of the appellant in an amount in excess of the penalty of said bond. The trial of the cause involved an extensive accounting of the moneys received and disbursed by Birrell during the period of time he operated the business of the appellant corporation under said contract. One of the defenses interposed was that the contract between the appellant corporation and Birrell was executed in pursuance of an illegal contract and scheme which was in contravention of the federal statutes.¹¹

II. We next consider the question as to the alleged illegality of the contract between the appellant and Birrell. There was a conflict in the evidence with regard to whether or not the arrangement entered into between Birrell and the appellant and the several manufacturers of pearl buttons was an unlawful combination in restraint of trade.*

It is unnecessary for us to set out in detail the testimony offered to support the contention of the appellee that the arrangement entered into between Birrell, the Birrell Corporation, and the several pearl button manufacturers was in contravention of [the Sherman Act]. The arrangement and plan of these parties, as shown by the evidence, was an attempt to secure a monopoly of the mussel shell industry, and was in restraint of trade. The contention of the appellees in this regard is also supported by the manner in which the operations were carried on.

In May of 1917 the Birrell Corporation sent out a letter inquiring

¹¹ Only so much of the opinion as relates to this question is here given.

*A part of the Sherman Act is here quoted.

in regard to the operations of two concerns that were selling "blanks." The letter states: "The buying of blanks from those concerns should be stopped immediately, unless they agree to buy the shells, through this factory or through this concern."

There is proof to show that this letter was sent out with the approval of the board of directors, who had been elected as such board of directors of the appellant company in pursuance of the arrangement entered into between the appellant and the manufacturers. The evidence also tends to show that the appellant published regular price lists made up from time to time at meetings of the directors and buyers from the several companies. The various dealings and operations of the appellant were gone into at length in the evidence. There was evidence that the general plan and scheme entered into between appellant corporation and the various pearl button manufacturers, which in part involved the employment of Birrell as manager of the appellant, for the purpose of effectuating the business entered upon, was in violation of the federal statutes, and was an illegal and unlawful scheme and plan. The matter was directly in issue by the pleadings, and the evidence is in dispute. The judgment of the trial court has the force and effect of the finding of a jury upon this question, and, under such circumstances, we cannot interfere. * * *

PULP WOOD CO. v. GREEN BAY PAPER & FIBER CO.

(Supreme Court of Wisconsin, 1914. 157 Wis. 604, 147 N. W. 1058.)

This action arises out of a series of contracts made between the plaintiff and the defendant, whereby plaintiff agreed to supply defendant with pulp wood for consumption at its paper mill. These contracts were made from year to year and covered the years 1904 to 1909 inclusive. A formal contract was not made covering the year 1909, but it is alleged that a contract was made by letter for that year similar to those covering previous years. The formal contracts are alike in terms except as to the amount of wood to be furnished and the so-called base price to be paid therefor.

[In substance, the contracts obligated the plaintiff to sell a specified quantity of pulp wood at prices named. Other purchasers were named, and it was provided that, whether the plaintiff was able to supply less than all required or economy of operation necessitated supplying more than all required, the defendant was to take its pro rata share. The defendant agreed not to buy any pulp wood elsewhere. At the end of the year, the so-called base price was to be modified, so as to include the plaintiff's cost of operation and 7 per cent. on its investment, and final settlement was to be made on the basis of the modified price. The complaint stated three causes of action: (1) For the defendant's pro rata share of losses suffered by the plaintiff; (2) for the defend-

ant's refusal to take and pay for pulp wood tendered; (3) for a balance alleged to be due for pulp wood delivered.] ¹²

The defendant interposed a demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. From an order sustaining such demurrer, the plaintiff appeals.

BARNES, J. The defendant contends that the contracts sued on are void under the federal Anti-Trust Act.¹³

Further, that such contracts were made in violation of sections 1791j and 1747e, Stats. Wis., which statutes read as follows:

"Sec. 1791j. Any corporation organized under the laws of this state which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its charter or authority to do business in this state canceled and annulled. Every corporation shall upon filing its annual report with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in this section."

"Sec. 1747e. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section."

The circuit court held that section 7 of the contracts by which the contracting consumers agreed not to purchase any pulp wood from any person, firm, or corporation except the plaintiff, unlawfully restrained trade, in that it took 12 consumers of wood out of the market and operated to the disadvantage of those who had pulp wood to sell by reducing the number of competing buyers.

The principal contention made by respondent's counsel in their brief and on the oral argument is that the contracts evidence a plan or scheme on the part of the contracting parties to control and restrict

¹² This abstract is substituted for most of the statement of facts.

¹³ Sections 1 and 2 of the Sherman Act are here quoted.

the output of pulp and paper, to the end that the market might be manipulated and prices raised, and that such purpose is made manifest by the fact that 12 or 13 large consumers of pulp wood have bartered away their rights from year to year for a series of years to supply their legitimate wants in the way of raw material. It is urged that the plaintiff is a spurious creature organized for ulterior purposes and to evade the law and that the real power behind it is a group of manufacturers intent on unduly stimulating competition or suppressing it altogether, as may best suit their lawless wishes, and that the inevitable tendency of the contracts is towards monopoly and unlawful restraint of trade.¹⁴

The case will first be considered on the aspect principally relied on by respondent's counsel and in reference to the so-called Sherman Anti-Trust Act.

The questionable features of the contracts arise out of the fact that they take in 12 or 13 large consumers of wood and that these consumers have appointed an agent who has the exclusive authority to buy all their pulp wood.

We do not construe the contracts as fixing a price which the plaintiff was to pay for wood. The prices specified in the sixth paragraph are merely an estimate, made in advance, of what the commodity would probably cost, and payment was to be made on the basis of this estimate as the wood was delivered. When the total expense for the year was ascertained, the purchasers were to settle on the basis of the actual cost, which included 7 per cent. interest on the capital employed by the plaintiff. If the estimated price was greater than the actual cost, the excess was to be refunded by the plaintiff. If the actual exceeded the estimated cost, the purchasers were required to make up the deficiency and pay in proportion to the amount of wood purchased.

This we deem to be the clear intent and meaning of paragraph 10 of the contract and of the provisions of the same taken as a whole. No other contract could be made if the actual purpose was to secure a supply of wood. The contracts covered future deliveries for a period of a year. Many conditions might arise which would materially affect the supply of wood. A good winter for hauling would tend toward a large supply and a lower price, while an open winter would greatly curtail output and tend to increase the price. The varying conditions of the wood market are reflected in the estimated prices found in the contracts. The estimated price of spruce was \$2 per cord higher for 1907 than for 1905, and of hemlock \$1.50 per cord higher. The plaintiff would have to pay the going prices whatever they were or go without wood. Its net earnings were restricted to 7 per cent. on the capital it had invested.

¹⁴ So much of the case as considers whether interstate commerce is involved is omitted, and the opinion otherwise is slightly abridged.

We do not understand that there is any serious dispute between the parties as to the intent and meaning of the contract in this regard. Neither do we think there is any doubt that the manufacturers who were parties to contracts like that set forth in the statement of facts attempted to make the plaintiff their sole agent and to give it the exclusive right to purchase their supply of wood. If it appears from the contracts, read in connection with the allegations of the complaint, that the parties had no lawful right to make such agreements, or that the agreements contravene public law, then the contracts are void, and the action will not lie because recovery cannot be had on a void contract. *Menominee River B. Co. v. Spies L. Co.*, 147 Wis. 559, 132 N. W. 1118.

The complaint being challenged by demurrer, every reasonable intendment must be made in favor of the pleading. * * * Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.¹⁵

A violation of the federal Anti-Trust Act is made a misdemeanor which is punishable by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court. "It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal." *Brown v. State*, 137 Wis. 543, 119 N. W. 338.

It is substantially ruled in some of the federal courts that, in close and doubtful cases arising under the anti-trust law and involving intricate questions, the merits will not be passed upon on demurrer nor until all the essential facts are before the court, where such facts may materially aid in determining whether or not the law has been violated. *United States v. Winslow* (D. C.) 195 Fed. 578, applying the equity rule as stated in *Kansas v. Colorado*, 185 U. S. 125, 144, 145, 22 Sup. Ct. 552, 46 L. Ed. 838. This rule of practice is not binding on this court, but does not differ essentially from our uniform holdings in later years as to when a complaint will be held bad on general demurrer.

There is not so much difficulty at the present time in determining what the law is as there is in making the proper application of established rules to the facts in each particular case. There has been a world of decisions on our anti-trust laws, common and statute, in the state and federal courts. To attempt to review them all would be a work of supererogation. To harmonize them would be an impossibility. On the federal anti-trust statute, however, our court of last resort has recently spoken in a number of well-considered decisions in

¹⁵ Citations of cases on these two propositions are omitted.

which the act of Congress has been carefully and learnedly analyzed and its scope defined [citing cases].

Whatever understanding or misunderstanding may have arisen out of the decisions in the *Trans-Missouri Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and the *Joint Traffic Association Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, it is now definitely decided that the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-Trust Act embraced only acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and that Congress intended that those words used in the act should have a like significance. *Standard Oil Co. v. U. S.* [221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; *U. S. v. American Tob. Co.* [221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663]. These decisions have been freely criticised and often denounced, but they are the law of the land. It is more than three years since they were announced, during which time Congress has been in almost continuous session. So far as we know there has not even been any attempt to pass a law declaring that every contract, combination, or conspiracy in restraint of trade is unlawful regardless of the extent of the restraint. We are inclined to agree with respondent's counsel that in the discussion of these cases "the light of reason" has "often been absent."

The real question before us for solution is: Do the contracts referred to, read in connection with the allegations of the complaint, show that they operated to the prejudice of the public interest by unduly restricting competition or by unduly obstructing the due course of trade?

The answer depends on the extent to which competition has been restricted or trade has been obstructed. This must be determined from the existing facts. When the facts are ascertained, the question of whether the restraint is reasonable or otherwise is one of law. *Richards v. American Desk & Seating Co.*, 87 Wis. 503, 513, 58 N. W. 787. Sometimes the essential facts may be so clearly shown by the contract involved, if one is involved, that further evidence is unnecessary to show that the restraint is unlawful. There is another class of cases where the contract in itself may present an innocent appearance; but, when considered in the light of other facts and circumstances, including the purpose for which it was made, the objects sought to be accomplished, and the results actually brought about, the contract may be positively vicious. In such cases the contract constitutes a link in the chain of evidence. There is a third class of cases where the contract involved shows some restriction of competition or some obstruction of trade, but does not show whether such restriction or obstruction is undue and unreasonable or otherwise. In such

cases it is necessary to resort to evidence dehors the contract to ascertain whether it is void or valid.

The contracts involved in this case would seem to fall within the latter class. If they are reasonably susceptible of an interpretation which would render them lawful, it is the duty of the court to place that interpretation upon them. It is argued by counsel for respondent that these contracts place a limitation on the production of pulp and likewise on the output of paper; that there is a federation of interests between the contracting parties; that estimates of the amount of wood required are made so as to effectuate the ulterior purposes of the parties, or it may be the group itself makes the estimates; that the power is centered in this group to dominate the pulp and paper market; that plaintiff is merely a clearing house for carrying out the unlawful objects of the combine; that the contracts referred to give the plaintiff power to crush competitors and force combinations; that they inevitably tend toward monopoly; that an unlawful restraint is placed upon the contracting consumers, in that they are not permitted to buy any part of their supply of wood under any circumstances. Some other considerations of like tenor and effect are suggested, but the foregoing is a substantially full epitome of the contentions of counsel on the point principally argued. These contracts are roundly and at times extravagantly denounced by counsel.

Defendant asks us to assume altogether too much in passing upon these contracts and the averments of the complaint. This is not an action brought by or in behalf of the public to dissolve an unlawful combination. It is a case where one particeps criminis is trying to avoid responsibility to his copartners in crime, if any crime was in fact committed. In liberating the plaintiff the defendant is also belaboring itself. It is true, it had no stock in the plaintiff corporation; but, if the corporation was organized for an unlawful purpose, the defendant aided, abetted, and assisted it in the execution of such unlawful purpose. The contracts before us covered a period of six or seven years. If the production of pulp wood and of paper was restricted for the purpose of inflating the price of paper or depressing the price of wood, the defendant is as well aware of that fact as is any one else, and whether it is or not the matter is easily susceptible of proof. The defendant certainly knows how long its mill was shut down for want of pulp wood, if it was shut down at all. It can be readily ascertained how long the other mills whose owners made like contracts were shut down for this or any other cause during that period. If no attempt was in fact made during this time to restrict output so as to squeeze up prices abnormally or to do other unlawful acts, that would be pretty convincing evidence that the plaintiff corporation was not organized to juggle the paper market. If the plaintiff has crushed or attempted to crush competitors, or has forced or attempted to force unlawful combinations to control the wood or paper mar-

ket, these things should be susceptible of proof; but it is not apparent from the contracts or from the complaint that it has done either.

For aught we know it may be shown on the trial that the contracting manufacturers made their estimates large enough to cover their needs without interference from anyone; that the estimated amounts were substantially furnished, or that a good faith attempt was made to supply them; that the exercise of that reasonable diligence which plaintiff agreed to exercise was sufficient to insure a full supply of wood, or at least as much as the millowners could secure if they were themselves engaged in the work of buying; that the mills affected had all the wood they needed at all times; that there was no thought of restricting the output of paper or pulp; and that there was no restriction in fact and no influence exerted on the paper market whatever by this alleged unlawful combine. It might even be made to appear that the only harm which the parties could do, if they attempted to reduce production, would be to themselves. It might also be made to appear that the plaintiff was organized to further legitimate economies in the cost of the article which the mill men had to offer the consuming public. Manifestly the question under consideration cannot be intelligently decided until the actual facts are before the court, because the complaint and contracts do not affirmatively establish the fact that there has been any undue restraint of competition or any undue obstruction of the course of trade. It is possible to imagine many things that might have happened, but the vital question here, after all, is: What has been done? The court should not be asked to draw on its imagination for its facts. The plaintiff has been operating long enough so that its practices should be well known. We do not think the contracts on their face inevitably tend to unduly restrain trade or competition.

There is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require and in giving such agent the exclusive right to do the buying. *National Dist. Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Kellogg v. Larkin*, 3 Pin. 123, 56 Am. Dec. 164; *Wheeler-Stenzel Co. v. Am. Window Glass Co.*, 202 Mass. 471, 476, 89 N. E. 28; *Burley Tobacco Co. v. Gillaspay*, 51 Ind. App. 583, 100 N. E. 89; *Reeves v. Decorah F. C. S. (Iowa)* 140 N. W. 844; *First National Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 152 S. W. 378; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *New York T. R. Co. v. Brown*, 61 N. J. Law, 536, 43 Atl. 100; *Arkansas Brokerage Co. v. Dunn*, 173 Fed. 899, 97 C. C. A. 454, 35 L. R. A. (N. S.) 464; *Anderson v. U. S.*, 171 U. S. 604, 613, 614, 19 Sup. Ct. 50, 43 L. Ed. 300; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, read in connection with additional facts stated in dissenting opinion of Justice Holmes in *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 272, 29 Sup.

Ct. 280, 53 L. Ed. 486. We do not wish to be understood as approving all that is said in those cases.

Such an arrangement becomes unlawful when it injuriously affects the public, or, in other words, when it unduly restricts competition or restrains trade. Ordinarily the invalidity of such an agreement must be made to appear from facts outside of the contract, because the writing seldom shows the facts necessary to determine whether the restraint is reasonable and permissible or undue and criminal. The circuit court thought the contract was unlawful because it took a dozen consumers of wood out of the market and thus materially affected those who had pulp wood for sale, by reducing the number of buyers. The idea of the court was that the contracts had a tendency to reduce the price of wood. This is a contention not very often made in this class of cases, because, if true, it would also have a tendency to reduce the price at which the manufactured article might be sold to the consuming public. However, we think the pulp wood producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public might to some extent benefit by the depression.

The complaint shows that the mills for which plaintiff acted as agent used about 12 per cent. of the entire output of wood in the territory in which it made its purchases. It cannot be held as a conclusion of law on these facts that there was an undue restraint of competition. The producers of wood have made no complaint on this score. There may have been an abundance of buyers to insure fair and free competition in bidding and a fair and adequate price for the wood. If so, it could not be said that competition was unduly restricted. The question is one calling for evidence to show how and to what extent it was reasonably probable that those who had wood for sale were affected. * * *

There are three causes of action stated in the complaint, and the demurrer is interposed to the whole complaint, so that if any good cause of action is stated the order appealed from is erroneous. * * *

The mere fact that the plaintiff corporation was an unlawful combination would not relieve the defendant from paying for the goods purchased from it, provided the contract of purchase was not in itself unlawful. *National Dist. Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *International Harv. Co. v. Eaton*, 163 Mich. 55, 127 N. W. 695, 30 L. R. A. (N. S.) 580, Ann. Cas. 1912A, 1022; *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491, 78 C. C. A. 607, 8 Ann. Cas. 889. This being the law, it is not apparent how the defendant can derive any benefit from 1791j, Stats. Wis.

Section 1747e, Stats. of Wisconsin, is a copy of the federal statute, except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than

is provided for in the act of Congress. It originally appeared as chapter 319, Laws of 1893. Since then it has received substantially the same construction, sub silentio at least, that was placed on the federal law in the Standard Oil and Tobacco Cases, as will be seen from an examination of the following cases decided since the law was enacted: *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540; *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233; *Burton v. Douglass*, 141 Wis. 110, 123 N. W. 631, 18 Ann. Cas. 734; *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N. S.) 119; *Ruhland v. King*, 154 Wis. 545, 143 N. W. 681; *National Dist. Co. v. Cream City Imp. Co.*, supra; *Richards v. American Desk & S. Co.*, supra; *Tecktonius v. Scott*, 110 Wis. 441, 86 N. W. 672. If the above statute has any application to the facts in this case, it should receive the same interpretation that was placed on the federal act, from which it was taken, by the Supreme Court of the United States.

Order reversed, and cause remanded for further proceedings.

KERWIN, J., took no part.

SECTION 2.—UNITY OF MANAGEMENT

CENTRAL OHIO SALT CO. v. GUTHRIE.

(Supreme Court of Ohio, 1880. 35 Ohio St. 666.)

Error to the District Court of Muskingum County.

The original action was brought in the court of common pleas of Muskingum county by the plaintiff in error against defendant in error, to recover the possession of a thousand barrels of salt. An order of delivery was issued to the sheriff of said county. The defendant, by answer, denied the right of the plaintiff to the possession of the property, and by cross-petition alleged, among other things, that the contract under which the plaintiff claimed was illegal and void, and prayed for an injunction, restraining the plaintiff from interfering in any manner with the property in dispute. The salt in question was manufactured by defendant at his salt furnace, known as the Harrison furnace, in the Muskingum valley. The plaintiff is an unincorporated association of salt manufacturers, doing business in the Muskingum and Hocking valleys, formed for the purpose of controlling the manufacture and sale of salt in those valleys, and is composed of thirty or more parties, engaged separately and independently in the manufacture of salt. The articles of association are in writing, of which the following is a copy:

"We, the undersigned, owners and lessees of the salt furnaces of the Muskingum and Hocking valleys, for the purpose of regulating the

prices and sustaining the quality of salt made by and for us, do hereby agree, and do bind ourselves, each with and to the others, jointly and severally, and our heirs, executors, administrators; and assigns, to the terms and conditions of the following contract, to wit: We agree that from this fifteenth (15th) day of September, 1871, and for a period of five years from the above date, we do hereby form ourselves into an association for the sale and transportation of salt.

"The association shall be called and known by the name of the Central Ohio Salt Company.

"The officers of the company shall consist of a president and five directors; two of the said directors shall be chosen from the Hocking valley and two more from the Muskingum valley, and one from Guernsey county, Ohio.

"The annual meeting of the company shall be holden at the company's office, on the second Tuesday of May of each year, for the election of directors and the transaction of such other business as may come before the meeting, except that the first election shall be held immediately after the organization of the association, at such time and place as may be agreed upon by the members of the association.

"The representation of the stockholders shall be one vote to each furnace.

"It shall be the duty of the directors to regulate the price and grades of salt, and settle all disputes and questions in regard to the same; also to employ an agent or agents, who shall be governed by them in all matters pertaining to the business of the company. The directory shall require a satisfactory bond from the agents for the faithful discharge of his or their duties, and safe-keeping of the funds of the company while in his possession.

"A majority of the board of directors shall constitute a quorum to do business.

"The manner and time of receiving and distributing salt shall be under the control of the directory.

"All salt made or owned by the members of this association shall be branded as the directors may require, and becomes the property of the company when packed out in barrels.

"Each member of the association binds himself to sell salt *only* at retail, and then only to actual consumers at the place of manufacture, and at such prices as may be fixed by the directors from time to time.

"And it is further agreed by the members of this association, that in case of any sale, lease, or other disposition of any furnace or furnaces now owned, operated, or controlled by them, such sale, lease, or transfer, shall be subject to each and all of the conditions of this argument, and the vendee or lessee shall at once become a member of this association.

"For the faithful performance of the covenants and stipulations herein named, we do severally bind ourselves, executors, heirs, admin-

istrators, and assigns, to the association in the sum of two thousand dollars (\$2,000), which sum shall be taken as liquidated damages, to be paid by any party who may fail in such faithful performance.

"This contract may be amended by a two-thirds vote of the members of this association.

"In case of any removal, resignation, or death of any member of the directory, it shall be the duty of the association to elect some one to fill the vacancy without delay.

"In testimony whereof, we have hereunto subscribed our names and affixed our seals, this 31st day of August, 1871.

[Signatures.]

"I, James Morrison, for myself and Charles Stone, do hereby agree to pay to the directors of the Central Ohio Salt Company ten cents per barrel for all the salt that we shall manufacture and sell, so long as the said company shall keep the price at not less than one dollar and seventy-five cents per barrel, at Zanesville, Ohio, for the term of five years from this date, and we do bind ourselves to be governed by the Central Ohio Salt Company's rates, and not to undersell them at any time during said term of five years.

"September 27, 1871.

[Signatures.]

"Amended September 7, 1871:

"It is understood and agreed, that the penalty in the foregoing article of association (of \$2,000) shall only apply to each individual who may violate the same.

"These articles of association shall not be binding upon any until all the salt-makers and lessees in Hocking and Muskingum valleys have signed the same.

"Joseph Kelly, Jonathan Barnes, Joseph Herrald, to have privilege of retailing salt at my mill."

The case made by the cross-petition of defendant was tried in the court of common pleas, where a decree was rendered in his favor. On appeal to the district court a like decree was rendered.

On the trial, testimony was offered showing that salt manufactured in other localities was placed in the same markets with the salt under the control of the plaintiff, and also, that the association does not include all the manufacturers of salt within the valleys of the Muskingum and Hocking rivers. It also appears that defendant, for some time after the organization of the plaintiff, complied with the terms of the articles, but afterward refusing to deliver to the company, salt manufactured by him, the original action was brought to enforce the agreement.

McILVAINE, C. J. The only questions made in the argument of this case relate to the validity of the contract of association. No objection has been made, in this court, or the courts below, as to the nature of the relief sought by the cross-petition of defendant, and that question has not been considered. That all contracts in partial restraint of trade are not void as against public policy, is too well settled to be

gainsaid; while, on the other hand, it is as fully established, as a general rule, that contracts in general restraint of trade are against public policy, and, therefore, absolutely void. Upon the authorities, however, the line, between such as are void and those that are binding, is not very clearly defined.

Public policy, unquestionably, favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public.

We think the contract before us should not be enforced. By it all the salt manufacturers (with one or two exceptions) in a large salt-producing territory, and whose aggregate annual product is about 140,000 barrels, have combined for the expressed purpose of regulating the "price and grade of salt." A board of directors is chosen. All salt made or owned by the members, as soon as packed into barrels, is placed under the control of the directors. "The manner and time of receiving and distributing salt shall be under the control of the directory." "Each member of the association binds himself to sell salt only at retail, and then only to actual consumers, at the place of manufacture, and at such prices as may be fixed by the directors from time to time." The directors make monthly reports of sales, and pay over the proceeds to the members, in proportion to the amount of salt received from each.

The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.

Nor is this agreement within the principle which permits a person to bind himself not to engage in trade at a particular place. Here the restraint was general. A member of this association, under this agreement, could not engage in the traffic at any place during the life of the association, except only to retail to actual consumers, at the place of manufacture, and then only from salt in bulk, and at the price named by the company.

It is also claimed, on behalf of the plaintiff, that this agreement does not affect the right of the members to continue the industry in which they are engaged without restraint; that the company can not control or limit the quantity of salt to be manufactured, and, therefore, the contract does not injuriously affect the interest of labor. We think that the provision that "the manner and time of receiving and distributing salt shall be under the control of the directory," confers upon the company ample power to embarrass the freedom of the members as to the quantity of salt which they might wish to manufacture. There

is no agreement that the company will receive all the salt manufactured, and at the time when it may be ready for sale.

On the whole case, we are clearly of opinion that this agreement is void as against public policy.

Judgment affirmed.

STANDARD SANITARY MFG. CO. v. UNITED STATES.

(Supreme Court of the United States, 1912. 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107.)

Mr. Justice McKENNA delivered the opinion of the court:

Suit by the government against appellants for a violation by them of the Sherman Anti-Trust Act.¹⁶

A decree was entered in favor of the government, from which appellants (designated herein as defendants) have prosecuted this appeal. 191 Fed. 172.

There are sixteen corporate and thirty-four individual defendants, the latter, with the exception of Edwin L. Wayman, being the officers, presidents, or secretaries, of the companies.

The corporate defendants were alleged to be the manufacturers of enameled ironware in various places in the United States, manufacturing 85 per cent. of such ware, and engaged in interstate commerce in such ware throughout the United States and with foreign countries, in competition with one another and with certain other manufacturers of such ware, and that in 1909, or early in 1910, they entered into and engaged in a combination and conspiracy to restrain such trade and commerce.

The defendants denied the charges against them, Wayman doing so in a separate answer. * * *

The corporate defendants are manufacturers of sanitary enameled ironware, such as bath tubs, wash bowls, drinking fountains, sinks, closets, etc. The enameling consists in applying opaque white glass to iron utensils, first in the condition of a liquid, and, second, in the form of a powder. The process consists in heating the utensils to a red heat and then sifting upon it the enameling powder. The powder is fused by the high temperature, and forms on the utensil a hard, impenetrable, insoluble, smooth, and glossy surface.

Prior to the invention of James W. Arrott, Jr., covered by letters patent issued September 26, 1899, the enameling powder was applied by a sieve attached to a long handle, which was held by the workman with one hand, and the sieve made to vibrate by the workman striking the handle with his other hand, thereby sifting the powder over the surface of the ironware. The implement was an imperfect one, not easily handled, and by its use the workmen were subjected to intense

¹⁶ The recital of the facts is abridged and a part of the opinion, relating to other questions, is omitted.

heat and physical strain. The flow of the powder, besides, was not continuous; it was cast upon the metal in intermittent puffs, causing in many instances an unequal distribution of the powder and producing defective articles which either had to be thrown away or sold as "seconds." With Arrott's invention these evil results are lessened or disappear. The sieve is mechanically vibrated very rapidly, causing, instead of an intermittent flow of the powder as in the hand process, a practically continuous flow. Both hands of the workman may be used to guide and direct the sieve. The advantages of the instrument over the hand process are decided. It is more efficient and more economical. It makes a better article and in less time. There is no waste in defects or "seconds." The workman is relieved to some extent from "fierce heat conditions," to quote from the answers.

At the time of the contracts which are attacked by the government the Standard Sanitary Manufacturing Company was the owner of the patent and manufacturer of 50 per cent. of the ware, and used in its production the patented device. Some of the other manufacturers were infringing and controversies existed. Some yielded to its validity, others contested it. It was sustained by the courts in several cases.

We have gone through this detail to exhibit the conditions, as asserted by defendants, which confronted them and induced their contracts. * * *

On the situation thus asserted to exist, the defendants build their defense, contending that Wayman saw its evils and conceived the way to correct them; and insist that the following facts are established by the evidence: Wayman was familiar, through his connection with another enameling company called the Seamless Steel Bath Tub Company, with the enamel ware trade, and had become convinced of the advantages, indeed, necessity, of the use of the Arrott invention. He tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies, and pending the negotiations the Seamless Company failed and Wayman turned to other plans, one of which resulted in the contracts under review. * * *

In August, 1909 (we are still following the version of the testimony given by counsel for defendants), it was suggested to Wayman by a person connected with one of the manufacturing companies that he (Wayman) apply for the position of secretary of the Association of Sanitary Enameled Ware Manufacturers which was about to be reorganized. The position, it was said, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent, and establish such relation with the manufacturers of enameled ware as would enable him to present in the most favorable manner his ideas in regard to the advantages of patent licenses under the Arrott patent. This association was a pure trade organization, and not formed to control or regulate prices. Wayman applied for and obtained the po-

sition, and commenced again negotiations for the Arrott patent, and persisted, against the apparent reluctance of the Standard Company to give up the advantages of the patent. Finally he impressed the manager of the Standard factories with the greater advantages which would come to his company by the elimination of "seconds," and removing them as competitors of the better articles of the Standard, confining the competition to such articles, of which the Standard produced 50 per cent. The manager of the Standard and that company yielded to the representation of these advantages. * * *

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. He, in the following December, secured also an option from the J. L. Mott Iron Works upon a patent called the Dithridge, and from the L. Wolff Manufacturing Company an option upon the Lindsay patent. These patents were infringements of the Arrott device. Thus equipped Wayman proceeded to engage the manufacturers in his proposition. * * *

Wayman's right, it seems to be contended, is all-sufficient, and that the manufacturers only paid the price that he could legally demand. As the demand was legal, it is argued, the payment of the price could not be illegal. But the government asserts subterfuge—illegal purpose liveried in legal forms to give color of right to illegal practices.

The charge challenges consideration of the relation between that which the manufacturers engaged to do and the protection of the exclusive right attached to the invention. Upon such consideration how far the licenses transcend such right and violate the Sherman law we can then determine. And we shall keep in mind and apply the principle expressed in *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. Ed. 1058, 1069, 22 Sup. Ct. 747, that the Sherman law "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, no doubt, was never contemplated by its framers."

In our inquiry we shall accept *arguendo* the statement of defendants of their inducement and purpose. We say "*arguendo*," because the asserted inducement and purpose are denied by the government, it contending, as we have seen, that the Arrott patent was but a pretense, and that the agreements were put in the form of licenses of it to at once accomplish and palliate evasions of the law. The fact being in controversy, we place our consideration and decision on other elements. * * *

On March 30, 1910, the Manufacturers' Association passed a resolution and a committee of five was constituted, to be known as the price and schedule committee, to which the license agreements and resale agreements should be referred. This committee was to interview the

various manufacturers and obtain their consent to the agreements which were to become effective "when the consent of 83 per cent. of the production" was had. The signatory manufacturers agreed to "give their prompt co-operation to the matter in question."

At the same time the following resolution was passed: "Whereas, a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and

"Whereas, long-term contracts are a menace to said proposition:

"We, the undersigned, manufacturers of enameled ware, hereby agree to take no orders for delivery beyond May 31, 1910.

"This agreement is not binding upon the signers unless all members of the 'Enameled Ware Manufacturers' Association are parties thereto and append their signatures.

"The within is agreed to."

At the same meeting a memorandum of agreement was proposed which was to be executed with Wayman as licensor of various patents covering pneumatic dredgers. The agreement covered selling schedules of the ware and provided for the royalties to be paid; the selling price to the jobbers to be established by the licensor through a committee appointed by the various manufacturers. It provided penalties for the violation of the price regulations, and preferential discounts (discounts allowed to certain manufacturers) form the selling prices. Such discounts were to be allowed on sales to jobbers only.

Such details as might "be necessary for the perfection of the arrangement" were reserved for the next meeting of manufacturers. After this meeting a circular letter was sent by Wayman to all manufacturers, apprising them of what had transpired, the attention that had been given the subject, and informing them that "the final license agreement papers" would be executed at the next meeting, to be held in May.

The license agreement was subsequently executed. It granted to the licensee the right to use in the manufacture of enameled ware the Arrott patent, also a patent to E. Dithridge for a pneumatic sieve and a patent to William Lindsay for an "enameling powder distributor." It released the claims for past infringement so long as the licensees operated under the license. It fixed royalties of \$5 per day for each furnace, subject to a diminution of like amount for furnaces shut down for more than six consecutive working days. It fixed preferential discounts from the regular selling prices, confining them only to sales by the manufacturers to jobbers. And it was provided that no goods manufactured under the license should be sold unless they bore a registered label (except where otherwise specified) owned by the licensee, and in addition thereto a license tag or label approved by the licensor, placed in a visible position thereon.

The provision for prices was as follows:

"The licensor agrees that he will employ a commission of six persons,

of which he is to be one, and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commission shall have supervision of all the relations and transactions between the parties hereto under this agreement; but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

"All terms and conditions relative to prices and discounts now established by the licensor and set forth in the annexed schedules and made a part hereof shall remain in force and effect until other terms, conditions, and preferential discounts are substituted therefor by the licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the licensor to the licensees. The licensee covenants to adhere to and maintain such terms, conditions, regulations, prices, and preferential discounts as may be established by the licensor from time to time, *and the licensee further agrees to sell no 'seconds' or 'B's' covered by schedules 4, 4½, 5, and 6.*" (Italics ours.)

The restrictions as to prices at which the goods were to be sold did not apply to those sold and exported to foreign countries. Such sales were required, however, to be proved to the licensor.

There was a provision for the return of 80 per cent. of the royalties paid if the agreement should be complied with. These royalties, called in the agreement "royalty rebates," were forfeited if the provisions of the agreement should be violated in any particular.

The foregoing constitute the essential provisions of the manufacturer's agreements, and it will be observed what little space is given to "seconds," though it is asserted in the argument, as we have seen, that to get rid of the evils of their production and sale was the chief impulse to the agreements. The covenant as to "seconds" was expressed by the words which we have italicized in the provision relating to prices and discounts, quoted above. The schedules referred to are found in the paragraph providing for preferential discounts, and cover all articles but baths, these being described in schedules 1, 2, and 3.

There was also a jobber's license agreement that bore at the top the note that it "must be executed by the purchaser in order to purchase licensed sanitary enameled ware." It conveyed to the jobber the right to buy and sell such ware, provided for certain discounts and details as to shipments and deliveries, and that the sales were to be made "by the purchasers at prices to be established and prevailing in the various zones into which the goods were shipped, regardless of the point of purchase." There was a provision for the payment of the purchase price at certain rebate periods if the agreement should be complied

with. The resale prices as established from time to time were required to be maintained by all jobbers and dealers, and sales could not be made from one jobber to another for any better prices than "established by the sheets," and the purchaser agreed to "observe and strictly maintain * * * the selling prices as they are set forth in the schedules, and observe and adhere to the rules and regulations as embodied in the price sheets," or embodied in price sheets which might be issued by or under the authority of the licensor. Articles might be added to or removed from the schedules at any time. The purchaser also agreed during the life of the contract not to purchase, sell, advertise, or solicit orders for, or in any way handle or deal in, sanitary enameled ironware of any manufacturer not licensed under the letters patent enumerated in the agreement, except with the express written permission of the licensor. A breach of any of the conditions subjected the contract and all unfilled orders to cancelation, the forfeiture of rebates, and the power to obtain the ware manufactured under the letters patent from any of the licensed manufacturers. The purchaser further agreed not to sell any goods on hand manufactured in accordance with the patents, irrespective of by whom manufactured, except in accordance with the prices, conditions, and regulations of sale established by the licensor.

The price list contained a notice to the jobbers' salesmen that the agreements executed by their companies required them to resell the various licensed products at no better prices, terms, or other regulations than therein established. And further, as changes, additions, and eliminations occurred, new sheets would be issued promptly.

These are the main outlines of the agreements, and, as emphasizing them, Wayman directed the manufacturers at the time they sent out the jobbers' agreements to also send with them a letter containing the following: "It is necessary for you [the jobbers] to execute these contracts before we [the manufacturers] can sell you licensed sanitary enameled ware." This provision was enforced, as indicated by letters in the record. It was also the condition expressed by Wayman in his correspondence with other manufacturers whom he tried to induce to accept licenses and become parties to the agreements. In a letter to a jobber Wayman expressed the hope that the jobber could see his way clear to execute the agreement, as it covered "a matter entirely for the jobbers' benefit." He further stated: "The Cedar Rapids Pump Company of your city have executed the agreement, and I hope you will co-operate immediately with your local competitors, which will be much more advantageous than a continuous cut market."

In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive con-

ditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail." The royalty for each furnace was \$5, 80 per cent. of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent. of the jobbers in number and more than 90 per cent. in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 56 L. Ed. 645, 32 Sup. Ct. 364, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. 307, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The

Sherman law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained.

This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy “by resort to any disguise or subterfuge of form,” or the escape of its prohibitions “by any indirection.” *United States v. American Tobacco Co.*, 221 U. S. 106, 181, 55 L. Ed. 663, 694, 31 Sup. Ct. 632. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. *United States v. Trans-Missouri Freight Asso.*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 548; *Armour Packing Co. v. United States*, 209 U. S. 56, 62, 52 L. Ed. 681, 684, 28 Sup. Ct. 428. * * *

Decree affirmed.

PEOPLE v. MILK EXCHANGE, Limited.

(Court of Appeals of New York, 1895. 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609.)

Action by the people of the state of New York against the Milk Exchange, Limited, to annul the defendant's charter. From an order of the General Term (29 N. Y. Supp. 259) reversing a judgment entered upon a nonsuit and ordering a new trial, defendant appeals.

HAIGHT, J. This action was brought to have the defendant, a domestic corporation, dissolved, its charter vacated, and its corporate existence annulled. This relief is sought upon two grounds: First, nonuser; second, an unlawful and illegal combination and conspiracy, made in restraint of trade, to limit the supply of milk, and to fix and control the price thereof in the city of New York and elsewhere. The defendant was organized on the 21st day of October, 1882, for the purpose, as stated in its certificate of incorporation, of “buying and selling of milk at wholesale and retail, the purchase of dairies of milk when deemed advisable, and the sale of the same to milk dealers.” The complaint charges that the defendant was not engaged in this business. Upon the trial, at the close of the evidence, it was conceded by both counsel for the plaintiff and for the defendant that the question whether the defendant had been engaged in buying or selling milk, under the evidence, was a question of law for the court, and not for the jury.

We so understand the evidence. There is no conflict, and we have but to ascertain the meaning and intention of the witnesses. The

plaintiff's chief witness was Woodhull, the secretary and treasurer of the defendant. In his testimony he makes use of the expression that the exchange "has bought and sold milk"; but he then proceeds to state that he is familiar with the operations of the Milk Exchange in buying milk of the farmers, and selling it to dealers, and then states the manner in which the business was conducted. He says: "It is this: A farmer brings his dairy into the exchange to be sold. I go out and find him a dealer who can use the milk, and write the farmer how to mark his milk. I make the collection of the dealer, and pay it to the farmer, and we guaranty him the collection." He further testified that their commission was 3 per cent.; that the milk was never shipped to the exchange, but was shipped directly to the dealer; that they sold the milk for the farmer at the exchange price, which they guarantied to collect, and turn over to the farmer, less their commissions. Numerous witnesses speak of their arrangement made, or attempted to be made, with the exchange for the sale of milk; and in each case it was distinctly stated that the exchange did not buy milk; that they merely looked up a dealer, who would purchase it at the exchange price; and that they guarantied the collection for 3 per cent. commission.

We think, therefore, that there can be no question as to the meaning of the witness Woodhull as to the expression made use of by him above referred to, for he immediately proceeded to explain how the milk was purchased and sold; and this evidence establishes the fact that the milk was not purchased by the exchange, but that it was sold in the manner described for the commission stated. The transactions, therefore, constituted a commission business, and were not, strictly speaking, the "buying and selling of milk at wholesale and retail." Whether the engaging in a commission business, such as we have described, is authorized by the defendant's charter, we do not deem it necessary now to determine. It may be that the commission business is so closely allied to that of buying and selling as to make the former legitimate and permissible under the defendant's certificate of incorporation.

We are thus brought to a consideration of the charge of unlawful conspiracy in restraint of trade. We have only called attention to the charge of nonuser for the purpose of showing the precise nature of the business conducted by the defendant as bearing upon the latter question. If the defendant was the purchaser of milk, or of dairies of milk, it had the right to fix the price from time to time that it would pay therefor. If, however, it was engaged only in the selling of milk upon commission, then its duty as a commission merchant, as ordinarily understood, was to get as high a price for the seller as could be reasonably obtained, and it was no part of its duty to otherwise fix the price of milk. It appears that the Milk Exchange, when organized, or shortly thereafter, had 90-odd stockholders, a large majority of whom were milk dealers in the city of New York, or

creamery or milk commission men doing business in that vicinity; that at the first meeting of the exchange after its incorporation the following, among other by-laws, was adopted:

"The board of directors shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of this company, and to declare the stock of any and every stockholder herein who purchases milk at any other than the price so named by the board forfeited, subject to the conditions set forth in article 3, sections 4 and 5, of these by-laws. All stock so forfeited by said board of directors shall be subject to the order of the board of directors, and shall be disposed of as they direct."

This by-law remained in force for a number of years, and until after there was an investigation as to the character and nature of the defendant's business, and a report made by a committee of the senate. The by-law was then amended by striking out that part thereof which authorized the forfeiture of the stock of a stockholder who purchased milk at another price than that fixed by the exchange. It was again amended in April, 1890, but that part thereof which provided that the board of directors shall have the power to determine and fix, from time to time, the exchange price of milk, was retained. Acting upon these by-laws, the defendant's board of directors have, from time to time, during its corporate existence, fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto. These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk. Was this lawful?

In *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790, certain parties, who were dealers in sheep and lambs, entered into an agreement, by its terms organizing an association for the declared purpose of guarding and protecting their business interests from loss by unreasonable competition. The agreement was to pool their commissions, except such as should be agreed to be paid to a butchers' association, with which they had agreed only to sell to the butchers, and the butchers to buy only of the dealers, belonging to their respective associations. It was held that the real nature and purpose of the agreement was to suppress competition in an article of food, and to so control the market that they could enhance the price of the article.

In *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, certain coal dealers organized a company known as the Lockport Coal Exchange. The object of the organization was to prevent competition in the price of coal among the retail dealers in that city by constituting the exchange the sole authority to fix the price which should be charged by the members for coal sold by them. Sheldon and others, members

of the exchange, were indicted, charged with the offense of doing an act injurious to trade or commerce. The trial judge submitted the case to the jury upon the theory that, if the defendants entered into the organization for the purpose of controlling the price of coal and managing the business of the sale thereof, so as to prevent competition in the price between the members of the exchange, the agreement was illegal. The jury found the defendants guilty. It was held that the principle upon which the case was submitted to the jury was sanctioned by the authorities.

Andrews, C. J., in delivering the opinion of the court, said: "The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law fixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Again, he says: "Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests, both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. * * * If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

In *Arnot v. Coal Co.*, 68 N. Y. 558, the Butler Colliery Company and the Pittston & Elmira Coal Company were corporations engaged in mining and selling coal. For the purpose of monopolizing the trade and maintaining a high price for coal, the two companies entered into a contract, by which one agreed to take all of the coal which the other should desire to send north of the state line at the regular market price, and agreed not to sell coal to any other party to be shipped in that direction. It was held that the agreement was entered into for the purpose of enhancing the price of coal north of the state line, and that it was against public policy, and void. Rapallo, J., in the opinion, says: "That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day." See *People v. Fisher*, 14 Wend. 9; *Hooker v. Vanderwater*, 4 Denio, 349;

Stanton v. Allen, 5 Denio, 434; Bank v. King, 44 N. Y. 87; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707.

Applying the rule thus established to the evidence under consideration, it appears to us that a case is presented in which the jury might have found that the combination alluded to was inimical to trade and commerce, and, therefore, unlawful. It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and, at their option, to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred.

It is asserted that this litigation was instituted upon the petition of members of the Milk-Producers' Union, and that the purpose of that association was to enhance the price of milk. This may be, but the action was brought by the attorney general, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the pleadings, and the parties have the right to have them determined upon the merits. If the Milk-Producers' Union is engaged in an unlawful business, which is a restraint upon trade and commerce, it may be dealt with in another action.

The order appealed from should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs. All concur (ANDREWS, C. J., and BARTLETT, J., on the ground of non-user), except PECKHAM, J., who dissents upon the ground that there was proof sufficient of user, and that the action of the defendant did not fairly tend to enhance the price of milk to the consumer.

Order affirmed, and judgment accordingly.

NORTH WESTERN SALT CO., Limited, v. ELECTROLYTIC ALKALI CO.

(House of Lords. [1914] App. Cas. 461.)

Appeal from a decision of the Court of Appeal reversing a decision of Scrutton, J., [1913] 3 K. B. 422.

The following statement of facts is taken from the judgment of the Lord Chancellor:

"The appellant company are a combination of salt manufacturers, and they are alleged to include substantially the whole of the salt manufacturers in the northwest of England, and to have obtained the practical control of the inland market in England for the sale of vacuum salt, stoved and unstoved. Stoved salt is salt which is used

for household purposes and which has been subjected to special drying processes to fit it for such purposes. Vacuum salt is salt, whether afterward stoved or not, which has been prepared by a process in which the waste steam from the works is carried under the salt pans, instead of fires being put under these salt pans.

"The contract between the appellants and the respondents, who were salt manufacturers, was made on November 9, 1907. By its terms the respondents agreed to sell to the appellants 72,000 tons of vacuum salt, of which 12,000 were to be stoved salt. Delivery was to spread over the four years between January 1, 1908, and December 31, 1911, in about equal monthly quantities. These quantities represented 18,000 tons a year, of which 3,000 were to be of stoved salt, unless the respondents in November in any year exercised an option to deliver unstoved salt only in the following year. The price was to be 8s. a ton for both kinds of salt, delivered into trucks at the sellers' works or into craft at their canal wharf. Stoved salt was to be loaded in bags, to be provided by the buyers, but to be filled and stitched at the expense of the sellers. The sellers were to be free to manufacture other salt for their own use, but not for sale, excepting so much as was required to satisfy a certain current contract. The sellers were to have the option of repurchasing from the buyers the stoved vacuum salt manufactured by themselves to the extent of 3,000 tons annually at the buyers' current prices. If the sellers made stoved vacuum salt they were to be elected distributors in respect of 3,000 tons annually, on the same terms and conditions as the buyers' other distributors. The sellers agreed not to lease or sell any of their land during the contract for salt making or boring for brine for salt making, but they might sell brine for other purposes than salt making. They were to be free to reduce or cease their making of salt. The agreement was to be taken as a settlement of all questions arising out of a previous agreement of August 25, 1906.

"There were, of course, other salt manufacturers, and these were also under contract to sell salt to the appellants, and they acted as distributors of salt for the appellants under an agreement for distribution, the terms of which did not substantially vary during the period covered by the contract sued on. The effect of these terms was that if the salt manufacturers exercised their option to repurchase the stoved salt, and then resold it, they would have to pay out of the price they received, not only the current selling prices, but certain amounts which they might receive for putting the salt into bags and stitching them, and the amount of these charges could be claimed by the appellants as additions to their current selling price. There were also loading and other charges, the amounts of which might be similarly claimed.

"The appellants' current price for table salt, apart from all additions—the naked price as it was called—was fixed on March 30, 1908, at 18s., and the respondents intimated their exercise of the option to re-

purchase. Controversy arose as to the terms and effect of the option when exercised, and as to whether the respondents were bound to sign a distributors' agreement and in what terms. Meantime the respondents began, in breach of their contract, to sell stoved salt to customers. They appear to have concealed these sales from the appellants. The latter, however, discovered what had been done and claimed damages.

"In the event the present action was brought. In their points of claim the appellants simply stated the contract of November 9, 1907, alleged breaches, and claimed damages. They set out particulars of the sales alleged to have been made in breach by the respondents, and stated the character of the dispute which had arisen as to the measure of damages. The respondents' points of defence were confined to a denial of the alleged breaches as regards the bulk of the stoved salt in question. The case made was that they had in substance repurchased and properly sold the stoved salt in question, and that they had duly paid or brought into court all the money the appellants were entitled to. As to another and smaller quantity of the salt in controversy, they admitted sales in breach of contract, but disputed the measure and amount of the damages claimed, and they brought into court sums which they alleged were sufficient to satisfy all proper claims. In their reply the appellants joined issue generally, and alleged that the respondents were only entitled to sell salt repurchased on the terms contained in the distributors' agreement, under which they ought, as a preliminary to such resale, to have lodged with the appellants the contracts for sale. This it was alleged that the respondents had not done, and the appellants further relied on certain inland conditions which were issued in accordance with the distributors' agreement, and with which it was said that the respondents had not complied.

"The respondents did not in their points of defence set up the invalidity or nonenforceability of the contract of November 9, 1907, and it was admitted at the bar that it was through no slip, but after consideration, that this was not done. The only questions raised by the pleadings were, firstly, whether the respondents had not in substance repurchased under the option in the contract, and then properly resold, and, secondly, as to the measure of damages.

"The action was tried in the Commercial Court before Scrutton, J. The learned counsel for the respondents, in the course of cross-examining one of the appellants' witnesses, raised the point as to the legality of the agreement. Counsel for the appellants objected that no such point had been pleaded. Scrutton, J., sustained the objection. He held that unless illegality appeared on the face of the plaintiffs' case the point could not be put in cross-examination, having regard to the fact that no such point was raised by the pleadings, pursuant to what was required by the Rules of the Supreme Court. He refused to leave to amend, but he said that if, after hearing the plaintiffs' case,

he was satisfied that the claim was as matter of law illegal or unenforceable, he would be bound to take judicial notice of this and to disallow the claim. He finally gave a judgment for the plaintiffs on the question of validity, and for the rest, confined it to the other questions which I have indicated. It dealt mainly with the measure of damages.

"The case went to the Court of Appeal, where a majority of the court, consisting of Vaughan Williams and Farwell, L. JJ., held that the contract was in restraint of trade and bad, and that the action should be dismissed with costs. Kennedy, L. J., dissented. The court was willing to grant a new trial, if both parties desired it, in which further evidence as to the circumstances could be brought forward, but the defendants elected to take a final judgment. The majority of the learned judges in the Court of Appeal held that the contract sued on must be read in connection with the distributors' agreement, and that this agreement must be read as connected with another agreement dated September 11, 1906, between the plaintiffs and certain other salt manufacturers in the northwest of England. They considered that when these agreements were construed together the contract of 1907 must be held illegal as being in restraint of trade, and as forming part of a scheme for securing a monopoly by restricting output and raising prices. 'In the present case,' said Farwell, L. J., 'no circumstances in my opinion could justify such a contract made for the mere purpose of raising prices, with the inseparable incident of depriving the members of the public of the choice of manufacturers, while hoodwinking them into the belief that such choice is open to them; in any case, the special circumstances would have to be pleaded and proved by the plaintiffs.'

"In his dissenting judgment Kennedy, L. J., held that there was no evidence on which, so far as the interests of the community were concerned, it could be held to be proved that the contract was contrary to public policy. It was, in his opinion, principally and essentially a contract for sale which was made between manufacturers and sellers of salt dealing with each other on equal terms, and regulating by partial and temporary restrictions, and for good consideration, the manufacture and sale of salt by one of them beyond a specified quantity, but only as part of a scheme for mutual profit. He found no sufficient evidence that the provisions of the contract of 1907 sued on were so injurious that it ought to be held invalid as offending against public policy."

The House took time for consideration.

VISCOUNT HALDANE, L. C. My Lords, this is an appeal by the plaintiffs in an action brought to recover damages for breach of a contract relating to the sale of salt. The question to be determined is whether the contract was enforceable. His Lordship stated the facts as above set out and continued:

Some doubt has been raised as to whether the general agreement with the other salt manufacturers of September 11, 1906, was put in evidence. But I assume for the present that it was in evidence, and I turn to it. It is contended that it must be looked at because of the provision of the contract sued on, which says (clause 7) that the respondents, if they make any stoved vacuum salt, are to be elected distributors on the same terms and conditions as the appellants' present distributors. These terms and conditions are contained in a document dated August 7, 1908, which was submitted to the respondents as already stated, and which they refuse to sign. It is headed "Distributors' Appointment," and it purports to define the terms on which a person appointed to be one of the appellants' salt distributors may purchase salt from the appellants and sell it. It defines the quantity that may be so purchased at prices to be fixed by the appellants, and the conditions on which it may be resold at prices to be similarly fixed, and it contains provisions regulating the amount to be sold, the discounts, the use of craft and rolling stock, the freight and other charges, and the customers to whom sales may be made. It provides that the appellants are not to be bound to deliver salt except at the works where it is produced, and that they may, on receiving any order, decide at which of the works of any of their members it is to be delivered. The document contains a statement that similar appointments had been given to other distributors, who were named, and in some cases it was stated that the appointment contained a clause providing that it should not prejudice rights under an agreement of September 11, 1906, being the general agreement already referred to between the appellants and the other salt manufacturers.

This last-mentioned agreement, which purports to be made with fourteen salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford, comprising both companies and firms, contains provisions largely resembling those in the contract sued on. The purpose of both contracts was to enable the appellant company to control the sales and prices of salt within its sphere of influence, and as the members of the appellant company were the salt manufacturers themselves, this was not impracticable.

My Lords, it is no doubt true that where on the plaintiff's case it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court, may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action

really rests on a contract which on the face of it ought not to be enforced, then as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality.

Now, in the case before us it is to me obvious that the Court of Appeal could not be sure that it had got before it the whole of the materials which were necessary if it was to be justified in deciding on the legality of what it took to be a scheme for securing the monopoly by restricting output and raising prices, and for depriving the public of the choice of manufacturers, while hoodwinking them into the belief that such choice was open to them.

Unquestionably, the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labor disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement. On material questions of fact such as these the Court of Appeal had not the proper evidence before it, and the pleadings of the respondents had thrown on the appellants no duty to bring forward such evidence.

The general agreement of 1906, which was referred to in the document relating to the appointment of distributors, was not the agreement sued on. It constituted only a surrounding circumstance in the case, and it is impossible to predict how that case might have appeared had the appellants presented full evidence of all the circumstances. The Court of Appeal ought, in my opinion, in the absence of amended pleadings and full evidence, to have refused to enter into what was a mere speculation on an intricate and wide question of fact. If this be so, then the only question which can legitimately be considered is whether the contract sued upon is one which on the face of it ought not to be enforced. As I read the judgments of the majority of the Lords Justices, they seem to have thought that the contract, although possibly valid if taken by itself, was not so in view of inferences of fact to be drawn from the character of the outside agreements to which it referred. But if there is not sufficient evidence to enable a court to review the situation in its entirety, then the court is confined to what appears on the face of the contract sued upon, including any documents incorporated with it. As the outside agreements and documents to which I have referred were not so incorporated, I think that they could

not be looked at in an action with the restricted issues which the pleadings before us raise.

I come back, therefore, to the contract on which the action is based. My Lords, the law as to contracts in restraint of trade is not doubtful. In order to be valid a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which show the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the court, and is not an issue of fact.

My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract, was in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured.

I have already adverted to the fact that competition from abroad and from other parts of the United Kingdom was not affected. It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry. No doubt if there were a monopoly attempted to be set up which was calculated to enhance prices to an unreasonable extent, that would, if it so appeared on the face of the contract, be

ground for refusing to enforce it. But an effective attempt to set up such a monopoly or so to enhance prices can but rarely appear on the face of an agreement between two traders. Whether such an attempt is really being made is almost always a question of fact. It certainly does not appear as being made on the face of the agreement in question. It may well be that prices such as 18s. or 23s. which were to be charged for the appellants' salt, were fair prices. The fact that the manufacturer is only to receive 8s. cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may be well worth while for a firm like the respondents, which obviously had to face much competition, to take a low price in order to secure a steady market, and the appellants' prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get.

Nor am I impressed by the view of Farwell, L. J., that the arrangements stipulated for by the appellants for directing the supply of orders to be made from the factories which they thought most convenient in particular cases was detrimental to the public who might be hoodwinked thereby. Such distribution arrangements are common in business. One of their obvious purposes is to save cost of carriage, and there is no reason to suppose that the business world is either ignorant that they may exist, and so is likely to be deceived, or is incapable of taking care of itself. In an appeal which recently came before the Judicial Committee of the Privy Council (*Attorney General of the Commonwealth of Australia v. Adelaide Steamship Co.*, [1913] A. C. 781) my noble and learned friend Lord Parker delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says ([1913] A. C. at page 796), that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."

My Lords, I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a Court of Justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public. And I agree with what was said by Lindley, L. J., one of the most cautious and accurate judges of our time, in *Maxim-Nordenfelt Co. v. Nordenfelt*, [1893] 1 Ch. 630, at page 646:

"The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."

The result of the consideration I have given to this appeal is that I think that this House should declare that the contract in question has not been shown to be in unreasonable restraint of trade, and that it was, therefore, enforceable by the appellants. As the Court of Appeal did not proceed to dispose of the points raised by the respondents as to the measure of damages, the case must be remitted to it for that purpose with the declaration I have suggested. The appellants are entitled to their costs of the appeal to this House and also to their costs of the last hearing in the Court of Appeal.¹⁷

O'HALLORAN v. AMERICAN SEA GREEN SLATE CO.

(District Court of the United States, 1913. 207 Fed. 187.)

Action by James O'Halloran and another, partners as O'Halloran & Jacobs, against the American Sea Green Slate Company and others, to recover damages, to be trebled under the provisions of the statute, for an alleged violation of the provisions of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

RAY, District Judge.¹⁸ * * * The findings made and filed herewith, and made a part hereof, show, I think, that prior to August, 1904, the producing defendants were engaged in business in the production and sale of "sea green" slate in competition with each other and all other producers of "sea green" slate in the United States; the producing area of such slate being confined to a narrow strip of territory along the western boundary of the state of Vermont and near the eastern boundary of the state of New York. Slate of other colors and qualities were and are produced in Maine, Pennsylvania, and elsewhere, and, of course, there was more or less competition between these other slates and "sea green" slate; but the sea green had a limited area of production of its own, a limited number of actual producers, and a market and demand of its own. It was not difficult to form a combination by and through which, not only the production and output of "sea green slate" should be limited or enlarged or controlled at will, but by and through which the dealers therein could or should be limited in number, and the price of sea green slate fixed and determined by the combination. This was done by and through the formation of the American Sea Green Slate Company, a New

¹⁷ The opinions of Lords Moulton, Parker of Waddington, and Sumner are omitted.

¹⁸ The opinion is slightly abridged.

York corporation, and the agreements and combination made between it and nearly all the producing companies, corporations, and individuals. * * *

Free competition between the producer and sellers in the production and sale of sea green slate as it had theretofore existed was destroyed, or substantially so, as nearly all producers came into the combination. As matter of fact production was controlled, as well as sales and prices were fixed, not entirely and completely, but substantially so, and interstate trade in sea green slate was in fact restricted and interfered with. It seems to me that when the producing defendants, theretofore engaged in producing and selling sea green slate and controlling substantially the entire production, agreed to form and did form this so-called selling corporation, the American Sea Green Slate Company, and placed in its hands the powers mentioned, and which were exercised, making themselves subject to its will and control in producing and selling, they "combined"; and when we find that the object of the combination was to control and at will restrict trade and commerce in sea green slate among the several states and control the price at which it should be sold, and the persons to whom sold, and the persons by whom it should be sold, it must be held that the combination was illegal, under the provisions of section 1 of the act referred to, which says: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

I acquit the defendants of any willful purpose or conscious design to violate this act; but this is no defense, if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several states. See *Addyston Pipe Case*, 175 U. S. 211, 214, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural, and known effects or consequences of their agreements and acts, and if these effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal, and the participants are chargeable with the consequences, and are liable for the damages resulting. See also *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

In *United States v. Union Pacific R. R. Co. et al.*, 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 (57 L. Ed. 124) the court said: "We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or sup-

pressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable." See *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

In the case at bar we find a combination which places several producing and selling persons, corporations, and companies engaged in interstate commerce in such a relation to each other as to create a single dominating control in one corporation, the American Sea Green Slate Company, whereby the natural and theretofore existing competition in producing and selling Sea Green slate in interstate commerce is unduly restricted. The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever affects or restricts and limits interstate commerce is illegal, is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint, the question of fact to be settled by the court applying the rule of reason. But the legality or illegality of a combination is not to be determined by weighing or balancing the benefits to the combining parties as against the injury to the public or public interests, or by weighing and balancing the possible benefits to the public interests as against the injury to such interests. So an honest intention on the part of the combining parties to benefit the general public, by cheapening the cost to the consumer of the article produced and sold, and giving him a better article, will not save from the condemnation of this statute a combination which restrains and restricts interstate trade and commerce in that article to any considerable degree, and places the power to control production and fix prices in the hands of a dominating corporation or of the combination itself. To so construe this act would make injurious effects on the general public, and not interference with and restrictions or restraints upon interstate commerce, the essence of the offending.

And it is equally true that an intent and purpose to aid the financially weak producer as against the strong, to some extent, as here, will not save the combination from the condemnation of the statute, if that be not the main and controlling purpose and result, but interference with and control of production and prices in interstate commerce be such purpose or the result. While those engaged in the production of an article and interstate commerce therein have the right in all lawful ways to protect and foster their industry, they are not permitted to go to the extent of combining to unreasonably fetter or restrict interstate commerce. It has been declared that agreements or combinations between dealers having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. This is but a polite way of declaring that combinations by dealers to loot the public for their own gain and benefit are illegal. Each and every

individual or corporation engaged in the production or sale of an article may, or course, fix the terms on which he will sell, provided he violates no law in so doing, for here the door to honest competition is left wide open, so that the public may protect itself; but when all, or substantially all, producers and dealers combine to fix prices and control sales, as well as production, the interests of the public are at once threatened, and necessarily injured.

Men may combine their money, their intelligence, and their industry or effort for their common good, and so corporations are permitted and copartnerships are lawful; but when those theretofore engaged independently in producing and selling an article combine their money, intelligence, and effort for the purpose of limiting the supply and controlling the price of such article, and destroying competition, and they interfere with interstate commerce, or their combination is such as in its operation and execution will bring about these results, they have become violators of the statute referred to, regardless of intent. The Supreme Court has declared that the act referred to "prohibits any combination whatever to secure action which necessarily obstructs the free flow of commerce between the states, or restricts in that regard the liberty of any individual to engage in business." *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

The power under and pursuant to the combination to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he must, of course, show the combination, its operation, and that it has resulted in damages to him. And of course, to bring a combination of this character within the condemnation of the statute, it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article, or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several states to any substantial degree, it is within the condemnation of the statute.

The defendants, except Sheldon Slate Company, which came in later, and one other, had negotiations which led up to the organization of the American Sea Green Slate Company, the purpose of which is stated in the findings, where the articles of incorporation are also set out. The defendants contend in effect that the competition between them was very injurious and well-nigh ruinous. It was understood and agreed that each of the producing companies, corporations, and individuals should sell the whole of his or its production of sea green slate to this selling corporation, when formed. And it was the purpose that this selling corporation should fix the price of all the slate

produced by those who went into the arrangement, whether actually turned over to it or not. It is not a case where the producers in the combination independently fixed their own prices for the same quality of slate at their own free will, or retained the power to fix and control the price to purchasers and consumers, and they were not even left free to fix and determine their own productions. If they did exercise these powers, it was at their peril. In the selling corporation formed, each producer had a representative, and contracts were executed and renewed by which they transferred to such corporation, not only their stock on hand, but all to be produced by them, and that in any manner thereafter acquired. It was also a part of the combination agreement that the stock of the corporation could only be sold to others after it had been offered to and refused by this corporation itself. All their slate from 1904 down to the trial was transferred to this selling corporation. There was a contract made and signed by the president of the corporation, and this resulted in the Cayahoga Roofing Company, an exclusive selling agency for certain territory, and representatives of all the producing companies signed the contract. A resolution was passed by this corporation forbidding the producers to move slate except on its written order, and the destination of the slate and the consignee must be given also.

Here are some of the things which this joint action of the defendants accomplished: By the exclusive ownership of their product the American Sea Green Slate Company had power, which it exercised, aside from price making, to restrain or destroy at will the competition in interstate commerce which had theretofore existed between them. It determined the persons to whom the slate produced by them should be sold, the classification of such persons, and authorized the entire exclusion of any of such persons. It also determined the quarries from which the producers' slate should be sold, and whether any should be sold, or whether it should be stored to serve the purposes of those in the combination; the terms and conditions of sale; and the piling and loading, etc., as directed by certain inspectors. There are many others which I will not recite. This combination centered its powers in this selling corporation, transferred to it all its slate, that of each producer, gave it control of prices, sale, shipment, and actually forbade the producers to move slate on their own account, except on conditions fixed by it. It is true that on certain conditions producers were permitted to repurchase and sell; but they were not free to sell or ship in interstate commerce the slate so repurchased, as the terms and conditions were prescribed by this selling corporation.

The learned attorney for the American Sea Green Slate Company ably contends that: "There is a distinction between combination and agreements that were entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, and those that give rise to the inference or presumption they had been entered into with intent to do wrong to the general public." There should be

added to this quotation: "And to limit the right of individuals, thus restraining the free flow of commerce, and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

The learned counsel says the first class mentioned are legal, the latter class illegal, and "what was done was to better producing conditions, to so aid producers they could successfully continue and increase their operations, without unduly or unreasonably increasing the cost to the consumer. What was so intended has been accomplished, the producers have been benefited, but that expense has not been at the expense of the consuming public." He also argues that in point of fact, since the organization of this selling corporation, the output and sale of sea green slate has increased, and that the case is devoid of evidence tending to show that the free flow of interstate commerce has been at all interfered with.

I think a combination or an agreement is within the condemnation of the act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production, and also fix or determine the class or classes of persons who shall be permitted to purchase and sell or deal in such commodity. The exercise of such a power would clearly interfere with and restrict the "free flow of interstate commerce." The article, as here, sea green slate, over 60 per cent. being in the hands of this selling corporation, could be for an indefinite period entirely, to that extent, withdrawn from the channels of trade. The supply to dealers and consumers in one or more sections of the country may be cut off or greatly limited. Is it a defense to those in such a combination to say that, true, we restrict and interfere with interstate commerce between New York and Boston and Providence and Portland; but we have largely increased such commerce in this article between New York and Cleveland and Chicago and Omaha and San Francisco, and, altogether, we have increased the interstate shipments of this article fourfold; true, we cut off South Carolina, Georgia, and Florida, and the South altogether, but we sell the entire product, which we have largely increased, in Ohio, Michigan, and the great West, and have thereby increased interstate trade and commerce in this article fourfold? I do not so understand the law.

It is also contended that no harm has been done by way of increasing the price of sea green slate to the consumer, inasmuch as the evidence discloses that such increases of price as have been made do not meet or more than meet the increased cost of production. Also: "Sea green slate is in competition in the markets with black slate, the production of the Pennsylvania region. The production there largely exceeds that of sea green. The prices of the sea green to the producers are limited to the prices of the black slate in the contracts previously referred to. The prices of the sea green to consumers are necessarily

limited to and regulated by those of the black slate, which so largely predominates in the markets. So it is not in the power of the Sea Green Slate Company to impose upon consumers any unreasonable burden in the way of price."

But, aside from the question of damages, if any, suffered by the plaintiffs, is it of consequence, in determining the illegality of this combination, whether or not the increase in price actually made was to meet the increased cost of production or to satisfy the alleged greed of those in the combination? Is a combination of this class any the less illegal for the reason it has not put in actual practice or operation the powers it has conferred upon itself by the joint action of its members? It is unquestionably true that sea green slate has met and meets and will meet in competition black slate from Pennsylvania and Maine and other places, and also a variety of other roofing materials, and that such competition will more or less affect and have to do with determining the price at which the sea green slate must be sold. This may have to do with the question of damages; but as it appears that sea green slate has a quality and a demand peculiar to itself, I am unable to see that the supply of black slate has much, if anything, to do with determining the legality or illegality of this combination. Is trade or commerce in this article among the several states restrained unreasonably, or may or will it be so restrained, by the operations of this combination is the crucial inquiry. * * *

I am now, under the stipulation, to pass on the illegality of the combination only, and whether or not the plaintiffs sustain such a relation to its acts as make a *prima facie* case of injury to some extent, even though it be nominal merely. The plaintiffs were and are large dealers in slate of various kinds, and in sea green slate, with others. Since the formation of this combination they have been compelled to pay more for this slate, they claim, and have been placed under restrictions not before in existence, and denied slate, they claim, because of this combination and its illegal character. The question of damages was not gone into, and I express no opinion, as I have none, whether or not the plaintiffs in fact have been substantially injured in their business or property by the acts of the defendants or either of them. The evidence is sufficient to show a *prima facie* case for some damage.

* * *

REEVES v. DECORAH FARMERS' CO-OPERATIVE SOCIETY.

(Supreme Court of Iowa, 1913. 160 Iowa, 194, 140 N. W. 844, 44 L. R. A. [N. S.] 1104.)

Suit in equity to enjoin and restrain defendants, their agents, servants, and employes, from demanding, collecting, or receiving any amount whatever under a contract or arrangement entered into between them, which contract, it is claimed, was and is monopolistic in

character; invalid, because in restraint of trade; and unfair, because intended to drive all competitors from the market. The trial court granted part of the relief prayed, and defendants appeal.

DEEMER, J. The defendant society is an organization of farmers, incorporated under the general laws of the state for pecuniary profit. Its capital stock is \$20,000, \$4,000 of which has been subscribed and paid for in cash. The articles of incorporation are not set out in full, but we gather from the record that the society was organized for the purpose of buying, selling, and shipping hogs at the town of Decorah, Iowa. The stock was \$10 per share, and at the time of trial there were 350 individual stockholders, composed of farmers living in the vicinity of said town of Decorah. At the time this action was commenced the society had been in business for two full years and had purchased 24,628 hogs, paying therefor the sum of \$433,638.98. There had been no gains to speak of and no dividends declared, but on December 1, 1910, it had a net gain of \$29.

We here quote, from the record, the following testimony, showing the nature and purposes of the society: “* * * In conducting the business of the defendant society there is no purpose on the part of its management to heap up a surplus nor any intention to make a profit in order to distribute a dividend among the stockholders. The directors authorized me at the time I began to buy stock to pay what I could, only just to pay my expenses as I go along and to pay for stock that they would sell after deducting my expenses. That is the policy upon which this society has been conducting its business during its business life. As a matter of fact I have just about met those expenses. The bulk of the stockholders of the defendant society are farmers, just a few who aren't farmers. I would say somewhere about 95 per cent. of them are farmers. It is pretty hard to tell as to the percentage, but in the neighborhood of that. Some of the stockholders haven't hogs to sell, but pretty near all of them are producers of hogs; none of the stockholders that I know of are hog buyers other than myself. The purpose of the incorporation of this society was to establish a market where the farmers would receive for their hogs what they were worth here in Decorah. The market at the time the company was incorporated was not considered a good hog market. The society was organized for selling their hogs and buying them, or any farmer who preferred to ship his own stuff could ship it through the company by paying five cents a hundred on hogs shipped or five dollars a car load. The fact of the matter is this society was formed primarily as a selling agency for the members of the society and for the bettering of the market conditions here in Decorah, and that has been its purpose during its entire business life and still is its purpose.”

Among other by-laws of the society were the following: “* * * In order to insure future success and prosperity of this society its members and shareholders are required to sell all their marketable produce and live stock to the society. Any member or stockholder

who may prefer to sell his produce or live stock to a competitor in this market shall forfeit to the company and pay over to its treasurer, from the proceeds received for produce or live stock so sold to other firms or competitors, the amount as follows: Five cents for every one hundredweight sold to any competitor."

Plaintiff, during the time in question and at the time of the commencement of this action was a local hog buyer at the town of Decorah, buying for the Chicago market, and he claims that the defendant society was and is so organized as to drive him from the field; that the members of the society are bound to sell their hogs to the society under the penalty of paying it a forfeit; and that it was organized for the purpose of monopolizing the business at Decorah, and was so operated, not only by and with its members and stockholders, but with strangers, so as to force him to pay more than the market price or to get out of business at that place.¹⁹

Oftimes in buying hogs from strangers, the society, defendant, paid more for hogs than plaintiff was able to pay, but whether this was due to economies practiced by it, to the fact that it had a surplus, or to the fact that members were compelled to contribute, whether they sold to the society or not, does not appear. But it is shown that in some instances it paid more to strangers than to members, when in competition, with plaintiff and his buyer. The net effect of the by-law in question was to compel all members to sell their hogs to the society, at such price as it might offer, or, in the event of sale to another, to forfeit and pay to the society five cents per hundredweight sold to any competitor. In order to be on an equality with defendant, in the purchase of the hogs belonging to members, plaintiff had to offer five cents per hundredweight more than defendant offered, and according to the testimony as to the actual usage in the market plaintiff was compelled to pay ten cents per hundred more than was offered by the defendant. This society was something more than a mere selling agency. It not only acted as a seller, but also purchased, in the open market, from members and nonmembers alike, save as heretofore stated.

The society was organized as a corporation for pecuniary profit and had \$4,000 in its treasury from the sales of stock. True, the testimony shows that it found, from experience, that it cost approximately 5 per cent. per hundredweight to buy and market the hogs, including all the expenses of the society, including salaries, etc.; but the fact that it made no profits is not in itself controlling.

Chapter 225 of the Acts of the Thirty-Third General Assembly provides:

"Section 1. That it shall be unlawful for any person, company, partnership, association or corporation owning or operating any business of buying, selling, handling, consigning or transporting any commodity, or any article of commerce, to enter into any agreement, contract

¹⁹ Testimony as to the methods of the society is omitted.

or combination with any other dealer, or dealers, partnership, company, corporation or association of dealers, whether within or without the state, engaged in like business, for the fixing of the price or prices at which any commodity or any article of commerce should be sold by different dealers or sellers; or to divide between said dealers the aggregate or net proceeds of the earnings of such dealers and sellers, or any portion thereof; or to form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented.²⁰

Without reference to this chapter, monopolies have always been odious at common law, and all contracts, arrangements, or agreements in restraint of trade or of free competition were void.²¹

Of course, a mere selling agency is not a monopoly, and neither the common law nor the anti-trust statutes apply to a genuine selling agency. *Cummings v. Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655; *Welch v. Phelps Co.*, 89 Tex. 653, 36 S. W. 71. Yet, if the plan be that of an agency, but the purpose is to create a monopoly, it is invalid. *Pacific Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Cummings v. Blue Stone Co.*, *supra*.

Whilst originally all contracts in restraint of trade were illegal, some exceptions were introduced into the common law, and the rule now seems to be that such contracts are not illegal, save when unreasonable in character, and that where incident or ancillary to some lawful contract, as between vendor and purchaser, partnership, employer and employé, and are not unreasonable in their scope or operation, they are not illegal. *Hoover v. Graves*, 7 Bing. 735; *s. c.*, 20 E. Com. Law, 310; *Jayne Co. v. Turner*, 132 Iowa, 7, 109 N. W. 307.

Again, the doctrine of restraint as applied to the early cases has been broadened, and all contracts in unreasonable restraint of competition are now understood to be in restraint of trade. *Eddy on Combinations*, § 720; *Arnold Co. v. Jones Co.*, 152 Ala. 501, 44 South. (662, 12 L. R. A. (N. S.) 150. [A quotation from this case is followed by the citation of the following cases: *Brown v. Jacobs Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126; *Hawarden v. Coal Co.*, 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828; *Ertz v. Produce Exc.*, 82 Minn. 173, 84 N. W. 743, 51 L. R. A. 825, 83 Am. St. Rep. 419; *Straus v. Am. Pub. Ass'n*, 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819; *Martell v. White*, 185 Mass. 255, 69

²⁰ Sections 2 and 3 of the act, which relate to penalties, are omitted.

²¹ Numerous cases are here cited and classified.

N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Ellis v. Inman*, 131 Fed. 182, 65 C. C. A. 488; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588.]

We need not refer to many other authorities announcing the same rules. So long as competition is regarded as the life of trade, all combinations, contracts, arrangements, or agreements made to stifle it, or which may have that effect, are regarded as unlawful, save as heretofore stated, where connected incidentally with some other contract as of purchase or sale or with contracts of employment, etc., so long as their restraints are reasonable and just. But, where disconnected with some other contract and made enforceable by fine or penalty, we think they come within the ban of the law.

True it is that each of the members of this association might have concluded not to sell any of his hogs to the plaintiff, and, perhaps, all might have agreed in advance not to do so. This would have been freedom of trade. But here there is freedom of trade in form, but annexed to that freedom is a fine or penalty for exercising such freedom. This is restraint of trade, or rather restraint of competition. That such fine or penalty made the society an illegal one is to our minds too clear for argument. Plaintiff was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to another. To our minds, this was undue restraint of competition, or, as the term is now understood, "restraint of trade."²²

The decree of the trial court was as follows: " * * * That the defendant corporation, Ole Ellingson, manager and treasurer, A. T. Holton, president, and Ed. Sellman, secretary, of said corporation, and each of them, their servants, agents, officers, directors, and employes, be and the same are hereby perpetually restrained and enjoined from exacting, collecting, receiving, or in any manner accepting any sum or amount whatever from any bid made by any competitor upon the general market at Decorah, Iowa, and vicinity, as an inducement or condition upon which said sellers shall or may sell or dispose of live stock to plaintiff, his servants, agents, or employes, and that plaintiff have judgment against defendants for costs."

This sufficiently guarded the rights of the defendants. It seems to be correct, and it is affirmed.

²² A discussion of the injunction as a remedy in such cases is omitted.

Ex parte BALDWIN COUNTY PRODUCERS' CORPORATION.

(Supreme Court of Alabama, 1919. 203 Ala. 345, 83 South. 69.)

Certiorari to Court of Appeals.

Action in assumpsit by the Baldwin County Producers' Corporation against Adam Fiskhorn to recover a 3 per cent. commission on certain gross sales made by Fiskhorn to a person other than plaintiff. The defendant had judgment in the trial court, and on appeal to the Court of Appeals this judgment was affirmed. 81 South. 862. Plaintiff brings certiorari to review and revise the judgment rendered by the Court of Appeals.

GARDNER, J. Petition for writ of certiorari to the Court of Appeals to review the decision of that court affirming the judgment of the lower court in the case of Baldwin County Producers' Corporation v. Adam Fiskhorn, 81 South. 862. The origin and nature of the suit is sufficiently disclosed in the opinion of the Court of Appeals, and need not be here repeated.

The Court of Appeals held that petitioner was a corporation organized under the general laws of the state, and not incorporated under the authority of the act approved August 25, 1909 (Acts Special Session 1909, p. 168).

This is the first question presented for consideration, and we are of the opinion the court fell into error in so holding. The declaration of incorporation expressly recites that the company is organized under said act of 1909, using the language: "This corporation is incorporated under special act of Legislature, approved August 25, 1909, and claims exemption from corporate taxation in amount of \$5,000.00."

The declaration further contains the following, "This corporation is not organized for pecuniary profit." The corporation is vested with the powers and authority conferred by the act under which it was created, reciting the particular powers and privileges conferred by said act, including the above provision as to the immunity from taxation to the amount of \$5,000. Section 5 of the act is set out in the opinion of the Court of Appeals, together with some excerpts from the declaration of incorporation.²³

While it is true that the charter provisions contained more detail specifications as to the powers of the corporation, and may in some particulars be more general in their scope than that authorized in the

²³ The act provides for the incorporation of mutual co-operative societies and associations for farming and trucking purposes, exempting them from corporate taxation and licenses. Section 5 provides "That such corporations shall have the power to buy, sell and lease and mortgage real estate, to build and operate warehouses, loading platforms and other means of facilitating the movement of products; to buy for its members seeds, fertilizers, and other needed articles for planting and marketing its products; to contract, sell or otherwise dispose of the crops growing or matured of its members, and to do all other things, incident to its purpose, for the mutual benefit of its members."

act, yet we are of the opinion that, where it so clearly appears and, indeed, is so expressly stated in the articles of incorporation, that the company is in fact organized under the act approved August 25, 1909. Such other powers which may be considered beyond the corporate authority will be treated as *ultra vires*, but would not destroy the powers granted under the corporate authority or change the company from what its declarations of incorporation declare it to be, viz., a corporation incorporated under special act of the Legislature approved August 25, 1909.

The court, in reaching the above conclusion, to the effect that petitioner was incorporated as a business concern for pecuniary profit, laid some stress upon the provisions of the by-law set out in the opinion, requiring the payment by any member of the corporation of 3 per cent. of his gross sales to the corporation when the sale is made to any one other than an agent of the corporation; but this by-law did not indicate that the company was organized for pecuniary profit within the meaning of the above-cited act.

The act clearly contemplated that the corporation should have some source of revenue, as, indeed, the performance of the powers given or authorized under the act would indicate that funds were required for carrying on the business of the corporation, which was for the mutual benefit of its members. Section 1 of the act discloses that such corporation was to be formed, "not for pecuniary profit in the sense of paying interest or dividends on stock, but for the mutual benefit through the application of co-operation, or other economic principles"; thus clearly recognizing the need of revenue necessary to carrying out the lawful purposes of the association, and drawing a distinction between pecuniary profits for this purpose and such profits for paying interest or dividends on stock. It was therefore not the legislative intent to create a business corporation, completely shorn of the power of raising revenue, in its corporate capacity, necessary to finance it as a going concern for the purposes for which it was incorporated. We therefore entertain the view that petitioner was incorporated under the act of 1909, and that the holding to the contrary is erroneous.

It is further held by the Court of Appeals that section 8 of article 5 of the by-laws of the corporation was void as being *ultra vires*, and also as being in restraint of trade. These conclusions are based upon the status of the petitioner as a business corporation, and one not organized under the act approved August 25, 1909. As upon this question of petitioner's corporate status we are in disagreement with the Court of Appeals, and the cause will be reversed, we need make no decision as to the validity of said by-law, as with the changed situation that court may, upon reconsideration of the cause, adopt an entirely different view.

In addition to this, the opinion does not treat the evidence relating to this particular by-law, and it is doubtful as to whether or not under

the rule governing cases of this character sufficient data here appears for a proper review of the same.

In view of the reversal of the cause however, for the above-stated reason, it is not inappropriate that we give some expression of our views upon the situation as is disclosed in the brief of counsel for petitioner, which is not here denied or questioned by opposing counsel. Counsel insists that the declaration of incorporation expressly authorizes the company to collect a reasonable compensation from members for any services rendered; that the company has erected a warehouse and platform and other facilities at Foley, Ala., for handling and disposing of the produce of its members, and had employes on hand to handle, assort, ship, and sell all kinds of produce for the market. Further: That petitioner purchased and kept on hand for use of its members fertilizers and seeds necessary in planting and raising crops of all kinds, purchasing the same at wholesale, and furnishing the same to its members at wholesale prices. That the agent of the company daily received reports of the prices of produce in the various markets accessible to Foley, and furnished the same to its members whenever desired; and that in fact petitioner was actively engaged in rendering service to its members—resulting in mutual profit and advantage to each of them. That it was necessary that it have a source of revenue to carry on the expenses of the corporation, and to this end adopted by-law numbered 9 of article 5, to the effect that all members of the corporation shall pay 3 per cent. of their gross sales to the corporation for all produce handled by the corporation, and also section 8—set out in the opinion of the Court of Appeals—for the payment of 3 per cent. of the gross sales made to any person other than the authorized agent of the corporation. That, in short, the corporation, for the services rendered, fixed a charge of 3 per cent. upon the gross sales of the produce of its members, whether sold through the corporation or not.

Prima facie the by-law in question was valid, and not *ultra vires* (Ala. City, G. & A. Ry. Co. v. Kyle, 81 South. 54), and the burden of showing invalidity rests upon those impeaching it.

The provisions of the act of 1909 clearly authorized the corporation to enact a by-law to secure from its members by assessment or dues, or otherwise, sufficient funds for the management of the business affairs of the concern; and we are fully persuaded the methods thus pursued were within the powers of the corporation.

Counsel further states the record shows that members were in fact encouraged in disposing of their produce to others, if, by so doing, a better price could be obtained, and that no penalty was attached to any member for such sale, but merely a 3 per cent. charge was fixed upon the gross sales whether to the corporation or outsider as a proper amount to be paid by each member for the advantages obtained from the corporation for the services rendered. Under such a state of facts, we entertain the view that this by-law does not come within the prin-

ciple of being in restraint of trade under the authorities cited in the opinion of the Court of Appeals, or in the following authorities examined by us: *Reeves v. Decorah Farmers, etc., Society*, 160 Iowa, 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104, and note; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Tallassee Oil, etc., Co. v. Holloway*, 76 South. 434, L. R. A. 1918A, 280; *Am. Laundry Co. v. E. & W. Dry-Cleaning Co.*, 74 South. 58; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655; *Arnold v. Jones*, 152 Ala. 501, 44 South. 662, 12 L. R. A. (N. S.) 150.

For the errors first pointed out, the writ will be granted, and the judgment will be reversed, and the cause remanded to the Court of Appeals for further consideration.

Writ granted; reversed and remanded. All the Justices concur.

McELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE
AGRICULTURAL & DAIRY SOCIETY, Limited.

(House of Lords. [1919] App. Cas. 548.)

Appeal from an order of the Court of Appeal in Ireland, reversing an order of Barton, J.

The respondent society was a co-operative society, and was registered in 1903 under the provisions of the Industrial and Provident Societies Act, 1893. It was affiliated to the Irish Agricultural Organization Society.

The appellant was a farmer residing at Ballydwyer, Ballymacelligott, in the county of Kerry, and was a member of the respondent society, having joined the society in October, 1903.

The appellant brought an action against the respondent society for a declaration that certain new rules of the society registered on February 1, 1916, were not binding on him as being illegal as in unreasonable restraint of trade and ultra vires the society, and for an injunction to restrain the society from acting upon the said rules.

The society was formed for the purpose of developing and improving the industry of dairy farming in Ireland by carrying on the manufacture and sale of butter and cheese and other milk products from milk supplied by such of its members as had milk to sell.²⁴

LORD BIRKENHEAD, L. C. My Lords, in this appeal the appellant seeks a declaration that a certain rule of the respondent society is not binding on the members as being improperly adopted to his prejudice, illegal because in restraint of trade, and ultra vires the respondent society, and he asks for an injunction to restrain the respondent society from acting thereon.

At the trial judgment was entered for the plaintiff but this was re-

²⁴ The statement of facts is abridged.

versed by the Court of Appeal in Ireland, and from that reversal the present appeal is brought.

The respondent society was registered on March 6, 1903, under the Industrial and Provident Societies Act, 1893, and was governed by special rules applying and modifying general rules.

By rule 3 of the special rules the society was empowered to carry on the occupations (*inter alia*) of dairymen and manufacturers of dairy produce, but there was no limitation as to the area within which such occupations might be carried on. Rule 4 provided that the shares should be transferable only, except guarantee shares, which if issued were to be withdrawable. Rule 11 specified certain rules which were declared to be fundamental and alterable only at a special general meeting by a two-thirds majority representing at least two-thirds of the nominal capital. Rule 20 provided that any member who should supply milk to any other creamery than that owned by the society for three years from his admission to membership without the consent of the committee should forfeit his shares. The general rules provided for the constitution of the society. Rule 45 enabled a member to transfer his shares with the approval of the committee. Rules 63-68 and rule 72 provided for the holding and conduct of special meetings, and rule 120 provided for the amendment of rules not declared to be fundamental.

Towards the end of 1915 the committee were considering a proposal to establish a new creamery at a place called, Gortatlea, and on November 15, 1915, the committee passed a resolution to call a special general meeting on December 7 to consider the adoption of a complete amendment of the society's rules. This meeting proved abortive and another meeting was held on January 18, 1916, at which a resolution to re-adopt the complete amendment of the society's rules was declared to be carried by the requisite majority. These new rules superseded both the special and the general rules and are called in the proceedings the rules of 1916. They were registered on February 1, 1916; and it is with these rules that your Lordships are concerned.

Rule 5 names some eighty townships, and provides that persons residing within any of them may become members. Other persons may become members if certain conditions are fulfilled, but no person carrying on business similar to that of the society is eligible to become or remain a member.

Rule 6 (1) binds the society to take all milk produced by members' cows kept or grazed on any lands within the area defined by rule 5, provided such milk shall be delivered fresh and in good condition at the creamery of the society at such times as the committee shall appoint, at the current price or rate fixed by the committee. In default the society is to pay 1s. per cow per day for every cow's milk not so accepted.

Rule 6 (2) binds the member to sell such milk to the society; and if he without the written consent of the committee sells such milk to any creamery other than a creamery of the society or to any milk seller or butter manufacturer he is to pay to the society the sum of 1s. per cow per day for every cow's milk sold contrary to the sub-rule.

Rule 6 (3) sets out exceptions which are not material.

Rule 16 provides that a member whose shares have been transferred or cancelled thereupon ceases to be a member, but a member is not otherwise entitled to withdraw from the society.

Rule 21 requires the consent of the committee to any transfer of shares but the committee are not bound to assign any reason for refusal.

Rule 69 provides that any dispute between the society and its members shall be submitted for arbitration as therein provided.

This rule brings into operation section 49 (1) of the act of 1893.

At the trial oral evidence was adduced to show that the provisions of rule 6 (2) would prevent any member who kept milch kine from selling to any one but the society, and that the society's prices were less than those obtained by members who up to then had not sold their milk to the society.

The plaintiff's attack was directed to the combined effect of rule 6 (2), rule 16, and rule 21. I was not impressed by the criticism of 6 (2) standing alone. But, having regard to the view which I have formed, it is not necessary to examine this contention. No attempt was made to show that the society was acting from improper or indirect motives.

The defendants adduced evidence to show that the amendments were made to carry out an arrangement to establish an auxiliary creamery at Gortatlea. Mr. Byrne, the secretary, said that it was necessary to protect the society against the unscrupulous competition of those who might pay a special price to kill the new branch, and also to enable the society to refuse unclean milk without members being able to take it to proprietary creameries. In cross-examination he said that the society would not take the risk of a new creamery without some guarantee that it would be supplied with milk. He was cross-examined with the object of proving that the society was applying the milk profits to capital expenditure. In re-examination he said that the necessary capital was borrowed from the bank on the guarantee of some of the members, and unless some such rule were adopted the members who had not guaranteed could have left the creamery without milk.

Mr. Jones, the chairman of the respondent society, said that the grounds for the rule were to guarantee an honest price to the creamery, and as the Gortatlea people were coming in the rules were to be adopted in order that they should be loyal to the society.

Mr. Riddall, an inspector of the Irish Agricultural Organization Society, gave evidence that it was essential that a co-operative so-

ciety should be ensured trade and that its members should be bound to deal with it. He admitted that a member who did not want to make butter and had other outlet for milk but a creamery would have the market closed to him by the rule. He also admitted that the rule might throw the burden on the farmer members who had not guaranteed. It was a form of counter security. The Rev. Patrick J. Brennan supported the rule on the grounds that some farmers were unreasonable and were open to the temptation of competition prices, and that the rule assured a larger supply of milk and safeguarded the position of the guarantors. As an application to stay the proceedings had been refused by the Court of Appeal in Ireland, and as a rule in the same terms had been held valid in two cases, namely, *Athlacca Co-operative Creamery v. Lynch*, 49 I. L. T. 233, and *Coolmoyne Co-operative Creamery v. Bulfin*, [1917] 2 I. R. 107, the judge and the Court of Appeal were only at liberty to decide whether the present case was distinguishable from the Coolmoyne and Athlacca Cases. The House of Lords is not so bound, and the questions decided by the Court of Appeal on the application for a stay, and by Ronan, L. J., sitting as a Judge of Assize in the Athlacca Case, and by the Court of Appeal in the Coolmoyne Case, fall to be decided in this appeal.

I deal first for convenience with the short contention that the difference between the parties was a dispute under the provisions of section 49, subsection 1, of the Industrial and Provident Societies Act, 1893, and, therefore, that the present action was not competent.

I am of opinion that this contention is ill founded. The question here is whether certain rules were illegal and ultra vires. Such a dispute is not a dispute between a member and the society within the meaning of the statute. The appellant in this case professes that he has not quarrelled with the society as lawfully constituted, but complains that the constitution of the society has been illegally altered. The dispute, therefore, rightly viewed, is a dispute between the persons as to the true constitution of the society. I adopt upon this part of the case the reasoning and the decision of the Court of Appeal in *Heard v. Pickthorne*, [1913] 3 K. B. 299.

I now approach the larger question whether the combination of rules attacked by the appellant in this case can be supported. I am of opinion that it cannot, and that the decision of the Court of Appeal in Ireland must be reversed.

The matters which were argued before your Lordships were much discussed in the Court of Appeal in Ireland in the case of the *Tipperary Creamery Society v. Hanley*, [1912] 2 I. R. 586. The rules under consideration in that case were not identical with the rules which are before your Lordships. In particular, the restraint in *Hanley*, [1912] 2 I. R. 586, extended over the whole of Ireland, and was not confined, as it is here, to a number of adjacent townships. But it is to be observed that in a sparsely inhabited agricultural neighborhood,

with scanty means of communication, a prohibition of trade in every township within a radius of ten miles, might have precisely the same effect upon the business of a small trader, as if the preclusion extended to the remotest corners of Donegal. Holding as I do that Hanley's Case was rightly decided, and that the effects of the present rules cannot on a true view of the law be distinguished from the effects of the earlier rules in Hanley, the conclusion follows that Ronan, L. J., was bound by Hanley when he decided *Athlacca Co-operative Company v. Lynch*, 49 I. L. T. 233, and that he ought to have held himself so bound. Similarly, in my view the decision of the Court of Appeal in Ireland in *Coolmoyne Co-operative Creamery v. Bulfin*, [1917] 2 I. R. 107 (on which the Court of Appeal founded itself in the present case) was wrongly decided, inasmuch as it was covered by the decision in Hanley's Case.

The principles of law which ought to be applied in such disputes as the present have been so fully and so recently expounded by your Lordships that no useful purpose would be served by attempting to restate them at length. Certain conclusions however which are directly relevant to the present dispute may be summarized.

A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public.

Your Lordships have recently laid down rules as to where the onus lies in these matters. Such considerations however do not arise in the present case.

Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive. The observation made by the Judicial Committee in the *Attorney General of Australia v. Adelaide Steamship Co.*, [1913] A. C. 781, 795: "Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public"; is not, in my view, to be construed as if both the tests indicated were not still in existence. It is indeed not difficult to conceive of a case in which a contract in restraint of trade might be adjusted to safeguard the reasonable interests of the contracting parties, and yet might be opposed to the public interest.

There is much to be said for the view that the restraint objected to in this case would be opposed to the public interest, but I do not think it necessary to decide this, having regard to the clear view which I have formed that the rules under consideration are not reasonable as between the parties.

My Lords, so much guidance has been given by this House in recent decisions to those whose duty it is to understand the criteria by which one tests the meaning of "reasonableness between the parties," that little need be added upon this point. The real test is, as your Lordships have so often pointed out, does the restriction exceed

what is reasonably necessary for the protection of the covenantee? To make the matter particular your Lordships have to reach a conclusion as to whether the combined effect of rule 6 (2), rule 16, and rule 21 is or is not to impose upon the appellant a greater degree of restraint than the reasonable protection of the respondents requires.

It is evident that the first question which requires an answer in this action is: "What was it against which the respondents were reasonably entitled to protect themselves?" Until this question is answered no answer is possible to the principal inquiry whether that which was stipulated for exceeded the reasonable needs of the case. My Lords, before attempting to discover a positive answer to the question I have proposed, it may be possible to clear the ground somewhat by answering it negatively. The respondents were not entitled to be protected against mere competition. No excellence of motive on their part, no record of efficient public service, can for this purpose place them in a different position from that occupied by any private contracting party who is called upon to justify his restraint. And it has been laid down by your Lordships over and over again that in this class of case the covenantee is not entitled to be protected against competition *per se*. The present case is entirely different from those in which he who has bound himself by the restriction has obtained inside knowledge or competitive resource by reason of the fact that special confidence under unusual circumstances has been reposed in him.

But a negative answer is not enough. I addressed a question upon this point to the learned counsel who appeared for the respondents, and I am not indisposed to accept his answer as reasonable. Mr. Conner replied to my question: "The respondents are entitled to such a degree of protection as will ensure stability in the lists of their customers." Let me then, without subscribing entirely to the words of this answer, treat it as being generally acceptable. Were the rules complained of necessary in order to secure stability in the lists of the respondents' customers? By "stability" must, of course, be understood such reasonable stability of relationship as a careful merchant is content with.

In order to answer the question indicated above the scope of the three rules complained of must be examined. I have already set out their terms. The combined effect is this. A member, if he joins young enough and lives long enough, may be precluded under heavy penalty for sixty years or more, and over a considerable area, from selling his milk to any creamery other than the respondents' creamery, or to any person who sells milk or manufactures butter for sale. It is necessary to notice that the penalty provided is avoided in favour of the member who obtains the written consent of the committee before making the sale otherwise prohibited. It is not pretended that it was the policy of the committee to give such consent. I say for sixty years or more, because having regard to the age at which mem-

bers become eligible for election, and to the possibilities of human life, the supposition is by no means extravagant. It is possible that rule 6 (2) could have been supported as part of a code which provided, in further rules, reasonable conditions of withdrawal. But the conditions of withdrawal which are contained in 16 and 21 are such as to make it for ever impossible for a member to withdraw, unless the committee gives its consent. Under rule 16 no member may withdraw unless his shares have been transferred or cancelled. Under rule 21 no share may be transferred unless with the consent of the committee of management. And it is expressly provided that no share shall be withdrawn. The result is that an unwilling member is likely to find himself precluded for life from disposing of the raw materials of his trade to anyone but the respondents (with the exceptions already noted) within a radius which may easily include every neighbouring centre of population which affords him the slightest prospect of a valuable market. It is no answer to such a man to say: "You can go elsewhere." He may easily be owner in fee of a small holding which has been in his family for generations. The fact that his integrity is known amongst his neighbours may be no small element in his stock of trade. Further, the power of migrating to a part of Ireland in which he may never have lived, and where nobody may know him, cannot be considered to be any alleviation of the severity or unreasonableness of the rule.

The position therefore is that the respondents claim to impose a restraint, within the limits already indicated, upon any one of their members which will last for life unless the committee empowers him to transfer his shares. My Lords, I see no reason whatever for supposing that, unless in the most exceptional cases, the committee would give such consent. In fact, they could not so consent without abandoning the whole spirit of their contentions and submissions before your Lordships. Indeed, holding the views they do they would be lacking in their duty to their members if they consented upon a large, or even upon a moderate, scale to such transfers, for they have explained very candidly to your Lordships the reasons which oblige them to insist upon continued membership. It is even necessary, so it is explained, to depress the prices paid to their members for milk in order to increase the capital available for new building operations. The result evidently may be that a member in township A receives admittedly less than the local value of his milk in order that township B ten miles away may be indulged with a creamery of its own. It is by no means to be supposed that I am disputing either the wisdom or the commercial justification of such a policy. I am using the illustration in order to make it clear that it is impossible for a society, whose extension requires such methods, to allow a wholesale transference of shares by members who find themselves in the position of the member whom I have imagined to be

carrying on his business in what I called township A. I assume therefore and indeed the contrary was not seriously argued that transfers would not be granted by the committee.

It is therefore necessary to ask plainly whether it can be reasonably necessary for the protection of the respondents to tie the appellant for life unless the committee thinks fit to grant him a dispensation. I am clearly of opinion that it is not and cannot be so necessary. I am further of opinion that these three rules read together are bad as being in restraint of trade and not reasonable as between the parties. It is not for your Lordships to frame rules which would be good. It is however, obvious that the objects indicated and claimed by Mr. Conner on behalf of the respondents could be secured in a variety of ways by imposing restraints which would fall short of those attempted to be enforced in the present case.²⁵

WASHINGTON CRANBERRY GROWERS' ASS'N v. MOORE.

(Supreme Court of Washington, 1921. 117 Wash. 430, 201 Pac. 773.)

MAIN, J. The purpose of this action was to restrain the breach of a contract. The trial resulted in a permanent injunction, from which the defendant appeals.

The Washington Cranberry Association is a corporation organized under the laws of this state, and is engaged in the business of marketing cranberries for those with whom it has contracts, and in some instances for independent growers. The appellant had entered into a contract with the corporation by which he agreed to deliver to it all the cranberries grown by him in Pacific county on land owned by him. The contract provides as follows:

"Witnesseth: That the grower, for and in consideration of one dollar paid him by the association, receipt of which is hereby acknowledged, and of the covenants and agreements herein contained, hereby nominates, appoints and agrees to employ the association as exclusive sales agents for the purpose of selling and marketing the entire crop of cranberries now growing or which shall be grown for shipment by the grower or for him, or in which he may have any interest as landlord or tenant, upon all those certain tracts of land situated in Pacific County, Washington, described as follows: Metes and bounds in section 27, township 16 north of range 11 west of Willamette Meridian, during the year 1916 and every year thereafter continually, provided, however that the grower may cancel this contract on the 15th day of January in any year by giving notice in writing to the association in writing at least 15 days prior to that date. Upon giving notice the grower shall, prior to said 15th day of January, pay any and all indebted-

²⁵ The concurring opinions of Lords Finlay, Atkinson, and Shaw of Dunfermline, and the dissenting opinion of Lord Parmoor are omitted.

edness due from him to the association and deliver his copy of the said contract to the manager of the association, and the same shall thereupon be canceled.

"The grower agrees at his own expense to cultivate, care for and harvest said crops. All fruit to be delivered by the grower at the warehouse of packing station of the association, at such place and at such time and in such manner as may be designated by the said association, which shall give notice to the grower for such delivery.

"In the event that grower shall fail to fulfill any or all of the requirements set forth in the foregoing paragraph, the association through its manager shall give to the grower written notice setting forth the default of the grower, and in event the defaults so specified shall not have been overcome or corrected within ten (10) days following delivery of such written notice to grower, it is mutually agreed that the association may consider this contract as canceled, and shall be relieved from further responsibility with regard to marketing the grower's fruit hereunder.

"The grower fully understands that the purpose, among others, of this agreement, is to maintain and increase to its greatest efficiency the association as well as the Central Selling Agency, with which it is now or hereafter may be affiliated, and to accomplish this purpose it is necessary that he shall strictly and fully comply with and perform the stipulations and agreements on his part agreed herein to be performed, and therefore he hereby stipulates and agrees that he will not sell or otherwise dispose of his said fruit to any other firm, person, or corporation other than the aforesaid association; and it is hereby further mutually agreed that, inasmuch as it is impossible at this time to fix and estimate the actual damage which will be sustained by the association in the event that the grower shall fail to abide by his agreement to market his said fruit through the association, such damages are hereby estimated and agreed upon as one dollar per box for each box of cranberries grown or sold by the grower, which sum shall be allowed in any action brought by the second party to recover damages for the breach of this agreement by the grower should the association elect, as it may elect, to bring such action.

"In consideration of its appointment as exclusive sales agent of growers' fruit crop, as above set forth, and in further consideration of the agreements made by the grower with the association as hereinbefore set forth, the association agrees to receive, ship and sell all of said fruit to the best possible advantage. To promptly remit returns therefor, less its regular charge for aforesaid services and for any other deduction, including money, due for advances for supplies furnished by the association to the grower, which indebtedness grower agrees may be treated by the association as a first lien on the proceeds from his fruit, and payment therefor to be deducted accordingly.

"In witness whereof the association has caused this contract to be signed and sealed in its name and behalf by its president and its sec-

retary, and all other parties have hereto affixed their individual signatures. Washington Cranberry Growers' Association, C. K. Cooper, President. Attest: W. M. Rounds, Secretary. A. B. Moore."

The Columbia River Cranberry Association is a corporation engaged in the same business as that of the Washington Cranberry Association, as is also the Oregon Cranberry Association, a corporation. After the contract above referred to was made the three corporations named entered into a contract whereby there was created what is referred to as the Pacific Cranberry Exchange, and appointed one L. S. Martin as the exclusive agent for the sale of all berries controlled by the three corporations. The cranberry exchange was composed of three members, a representative of each of the corporations. In the contract they are referred to as "the associations."

It is provided that the cranberries shall be delivered f. o. b. cars at points designated by Martin, and that he agrees that "he will immediately upon acceptance by his representative of cranberries, upon surrender of bill of lading, advance to the Pacific Cranberry Exchange, the agent of said associations, the sum of \$2.00 per box of the size heretofore indicated, said bill of lading hereinbefore mentioned shall be forwarded by said Pacific Cranberry Exchange, with draft attached to the Bank of California, of Portland, Or.

"The representatives of the said L. S. Martin shall have access to the warehouses of the associations and to the warehouses or store-rooms of the individual members of the associations, to determine the quantity, conditions and quality of berries available at any given time. A representative of the Pacific Cranberry Exchange may at any reasonable time have access to the books of the said L. S. Martin, at his offices in Portland, Or., for the purpose of checking sales and returns made by the said L. S. Martin.

"All returns shall be made to the Pacific Cranberry Exchange, the agent of said associations, on or before thirty days after the expiration of the month in which the berries are shipped to the said L. S. Martin.

"The associations agree that the said L. S. Martin shall receive a five per cent. commission on all gross sales of all berries sold by it to jobbers in the states of Oregon and Washington, and six and one-half per cent. on all other berries sold by the said L. S. Martin, and the said L. S. Martin hereby agrees to accept said commissions in full settlement for his services in the sale of said berries.

"The said L. S. Martin shall only be liable for actual negligence on his part, and no liability shall be attached to him by reason of damages caused to the associations or to individual members thereof, by strikes, embargo, shortage of equipment, or any other cause beyond the control of said L. S. Martin by use of reasonable diligence.

"It is understood and agreed that the fullest co-operation of the associations and of the Pacific Cranberry Exchange will be extended to the said L. S. Martin in the handling and marketing of said berries.

"All sales shall be made at the market price, or at a price to be mutually agreed upon by said L. S. Martin and the Pacific Cranberry Exchange."

In Pacific county there were approximately 80 cranberry growers, and 60 of these had contracts with the respondent similar to the one set out. After the contract was entered into and during the year 1920 the appellant produced 1,300 boxes of cranberries and 500 of these were sold to parties other than the contract provided. As above stated, this action was brought to restrain the appellant from selling cranberries to parties other than the respondent. The appellant makes three principal contentions: First, that the contract is void at common law as against public policy; second, that it is contrary to article 12, section 22, of the Constitution of this state which is a section covering the matter of monopolies and trusts; and, third, that the contract is void as being in contravention of the Sherman Anti-Trust Act passed by the Federal Congress on July 2, 1890. U. S. Comp. St. §§ 8820-8823, 8827-8830.

To determine whether the contract is void for any of the reasons stated it is necessary to read the contract in connection with the procedure under it and the result which was produced thereby. The appellant contends that a monopoly is created, trade strained, the output of cranberries limited, and prices are controlled. It may be admitted that if this is the effect of the contract and the business transacted under it, it would be void and unenforceable. The contract required the appellant to deliver all cranberries grown by him to the respondent for marketing until it should be terminated in accordance with the terms therein stated. The purposes of the contract, among others as stated therein, are to maintain to its greatest efficiency the association, as well as the Central Selling Agency with which it is now or may be hereafter affiliated. The corporation is made the exclusive sales agent for the growers' fruit crop. The evidence shows that the purpose of entering into the contracts of which the one above set out is one was as follows:

Before the corporation was organized certain growers at times put upon the market cranberries of an inferior grade, and this caused merchants to refuse to buy berries from Pacific county. In order to avoid this situation it was necessary to enter upon an advertising campaign to stimulate the use of berries and to cause berries of uniform grade to be placed upon the market. Another purpose was to secure a uniform price and avoid flooding any one market, as would be done if a large quantity of berries was shipped to a particular point at one time. Under the selling agency the quantity of berries going to any one market was regulated, and in this way tended to maintain or "hold up," as the evidence shows, the price. It was also for the purpose of enabling all growers to receive for their berries a uniform price. There is nothing in the contract or the operation under it that limits the production or controls the price in any particular locality. While the selling agency

was located in Portland the berries handled through the cranberry exchange representing the three corporations came in direct competition with eastern berries, as well as with the berries of independent growers.

The cranberry association controlled about 2 per cent. of the berries produced in the United States, the independent growers 32 per cent., and the American Cranberry Exchange, which was an organization operating in New York and Chicago, 65 per cent. The berries sold through the selling agency in Portland created by the three corporations sold at the market price, and the berries were shipped by the corporations to such points as Martin, the selling agent, designated. The evidence is that the price of the berries in the various markets was fixed and controlled by the American Cranberry Exchange. If the Pacific berries could not be sold for the same price as the eastern berries, the selling agent, after conferring with the members of the exchange, would sell for a lesser price. The contract and the delivery of berries under it not resulting in limiting the production, controlling or fixing of the price in any particular market, cannot be said to be void as against public policy, or under the constitutional provision above referred to or under the Anti-Trust Act.

The question as to when a contract is a restraint of trade was fully discussed in *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522. It was there recognized that it was difficult to state the rule which would cover all cases, and that the circumstances of each particular case and the situation of the parties in addition to the effect on the public welfare must be considered in determining the validity of a contract.²⁶

In *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452, it was stated that in determining the validity at common law of a combination claiming to be in restraint of trade the true test is "whether they afford fair and just protection to the parties [thereto], or whether they are so broad as to 'interfere with the interests of the public.'" In *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, in determining whether a contract was void at common law or under the Anti-Trust Act the test applied was whether there was a reasonable restraint of trade, "considering whether the restraint is such only as to afford a fair protection of the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

A large number of cases cited in the briefs where contracts have been held void as being a restraint of trade, but it does not seem necessary to review these in detail. So far as we are informed, no case

²⁶ A quotation from this case is omitted.

holds that a contract is void which does not limit the production or control or fix the price in a particular market. As above pointed out the contract here under consideration, considered in connection with the evidence showing the operation under it, neither limits the production nor fixes the price. The cases of *Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211, and *Cravens v. Carter-Crume Co.*, 92 Fed. 479, 34 C. C. A. 479, are cases where the combinations there in question limited the production and increased the price, and are therefore not in point in this case.²⁷

The judgment will be affirmed.

STATE EX REL. ATTORNEY GENERAL, v. STANDARD OIL CO.

(Supreme Court of Ohio, 1892. 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.)

The state, by its Attorney General, commenced this action to oust the defendant of the right to be a corporation, on the ground that it has abused its corporate franchises, by becoming a party to an agreement that is against public policy.²⁸

MINSHALL, J. Three questions arise upon the pleadings: (1) Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity to the agreement constituting the Standard Oil trust? ²⁹ (2) Had the company power to become a party to such an agreement? (3) If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time? * * *

The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, the Standard Oil Company of Ohio, being one. It is then covenanted by the parties that as soon as practicable a corporation shall be formed in each of certain states, under the laws thereof, (Ohio being one,) to mine for, produce, manufacture, refine, and deal in petroleum and all its products, with the proviso, however, that, instead of organizing a new corporation, any existing one "may be used for the purpose when it can advantageously be done," and in Ohio the defendant has been so used. In a subsequent part of the agreement nine trustees are selected, their powers and duties are defined, and provision made for the selection of their successors. As will hereafter appear, it is made the duty of the parties to the agreement to transfer their stocks or interests in their respective companies or firms to these

²⁷ In the remainder of the opinion it is held that an injunction is a proper form of relief.

²⁸ The amended petition, the answer, and the demurrer thereto are omitted.

²⁹ Much of the discussion of this question is omitted.

trustees, who hold the same in trust, but with the power to vote on the same as though the real owners; in consideration of which trust certificates are issued to the owners, who, as the owners of such certificates, elect the successors of the trustees. It is then provided that all the property, assets, and business of the corporations and limited partnerships embraced in the first class "shall be transferred to and vested in the said several Standard Oil Companies." And in order to accomplish this purpose it is provided that "the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey, and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property real and personal, assets, and business of said corporations and limited partnerships."

Now, in the case of the defendant it will be observed that this contemplated, and could not have accomplished without, corporate action. The Standard Oil Company of Ohio was required to transfer all its property, assets, and business to a new company, to be organized in the state; and this was to be accomplished by the obligation imposed on its members and stockholders, all of whom are parties to the agreement, to authorize and require the directors and managers to make the transfer. The property and assets of the corporation could only be transferred by a corporate act, and the agreement could not, in this respect, be carried into effect, other than by such corporate act, and clearly indicates that the purpose of the stockholders of the defendant in becoming a party to it was to affect their property and business as a corporation; in other words, was to act in their corporate, and not in their individual, capacity. The subsequent agreement of January 4, 1882, does not materially change the original agreement in this regard. Reciting that "it is not deemed expedient that all of the companies and associations should transfer their property to the said Standard Oil Companies at the present time," and "that it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer" should be made, it provides that, "until said trustees should so decide, each of said companies shall remain in existence and retain its property and business; and the trustees shall hold the stock thereof in trust as in said agreement provided." So that, under the agreement as modified, the directors and managers of the defendant may be required by its stockholders and members, all of whom are parties to the agreement, to make the transfer of the property and business of the defendant whenever the trustees may, in their discretion, direct. The effectiveness of this provision to secure all intended by it may be better understood by observing that "the directors and managers," "the stockholders and members," and "the trus-

tees" here mentioned are substantially the same persons, occupying these different relations at one and the same time. It signifies nothing that the transfer here provided for has not, as respects the defendant, been made. It does not change the evidence it affords of the purpose and object of the members of the corporation in becoming parties to the agreement.

Again, the agreement, as performed by the members of the defendant, as effectually places the property and business of the defendant under the control and management of the Standard Oil Trust as if the same had been transferred as provided in the original agreement. It is averred in the petition, and not denied in the answer, "that prior to the dates of the trust agreements aforesaid defendant's capital stock consisted of 35,000 shares of \$100 each, and upon the signing of said agreements in the manner aforesaid 34,993 shares of said stock, belonging to the persons who signed the agreements in manner above set forth, (in what proportions, however, plaintiff is unable to state,) were transferred, by defendants transferring officers, upon defendant's stockbooks, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares, and in pursuance of the provisions of said trust agreements; the remaining seven of said shares of stock being retained or transferred to the directors of defendant company. That at the time said transfer of stock was made there were seven directors of defendant, and each one of the seven held one share of the stock aforesaid, but the number of said directors was thereafter reduced to five who still hold and vote said seven shares of stock, and no more. That in lieu of the transfer of said 34,993 shares, as aforesaid, to the nine trustees above mentioned, an equal amount, in par value, of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, was issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said 34,993 shares of stock in defendant company. That the capital stock of said defendant company is still \$3,500,000, and the nine trustees before mentioned still hold and control the 34,993 shares thereof which were transferred to them as above stated." So that all but 7 of the 35,000 shares of the defendant's capital stock has been transferred by the owners, who are parties to the agreement, to the trustees of the Standard Oil Trust, and continue to be held in trust, as appears by the supplemental agreement; the transferrers receiving in lieu thereof trust certificates equal at par value to the par value of the stock received.

The control which this gives and was intended to give over the business of the defendant appears from the following provision contained in the trust agreement: "It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships any portion of whose stock is held in said trust. It shall be their

duty, as stockholders of said companies, to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates." Thus the trustees, as the legal owners of the stock, may not only elect who they please, but may elect themselves, as directors of the defendant; and not only may manage, but it is their duty to have "the affairs" of the defendant managed and directed in the manner they may deem most conducive to the best interests of the holders of the trust certificates. In other words, it is to be managed in the interests of the Standard Oil Trust, whose principal place of business is in New York city, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; for the holders of the trust certificates received in exchange for their stock transferred to the trustees remain, in law and in equity, the real owners of the stock so transferred. And the averment in the answer that the dividends of the company are paid to the holders of its stock, "appearing as such on its stock books," is immaterial, since these persons are not the owners, but the trustees, of the stock. In fact, the averment is simply a part of the evidence that the company, through its directors, recognizes and performs the agreement on its part. The payment of its dividends to the persons appearing as stockholders on its stock books is what enables the parties to the agreement to realize the primary object of the trust agreement—the accumulation of the earnings of the various companies, partnerships, and individuals named in the agreement, as a common fund, from which the holders of the trust certificates are to be paid dividends when declared by the trustees, and whereby many separate interests, being united under one management, form a virtual monopoly, through the power acquired, of so controlling the production and price of petroleum and its products as to destroy competition.

Applying, then, the principle that a corporation is simply an association of natural persons, united in one body^a under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers, and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by

the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto.

2. That the nature of the agreement is such as to preclude the defendant from becoming a party to it is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have "the affairs" of the several companies managed in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformably to the purpose for which it was created by the laws of its state. By this agreement—indirectly it is true, but none the less effectually—the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of

manufacturing, refining, and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price, at its pleasure.

All such associations are contrary to the policy of our statute, and void. *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. Rep. 660. "The word 'trust,'" says Mr. Cook, "was first used to mean an agreement between many stockholders in many corporations to place all their stock in the hands of trustees, and receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests, and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the 'trust' is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton Seed Oil Trust, and the Sugar Trust are examples of this method of combination." Cook, *Stocks*, § 503a. See, also, *Wait, Insolv. Corp.* § 478.

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102. After commenting on the tendency of the combination known as the "Diamond Match Company" to prevent fair competition and to control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the "Case on Monopolies," *Darcy v. Allein*, Coke, pt. 11, 84b. They are these: (1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases." (2) "The incident to a monopoly is that, after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the common wealth." (3) "It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their fam-

ilies, who will now of necessity be constrained to live in idleness and beggary."

The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employés or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.³⁰

The defendant, as we have shown, in making and entering into the trust agreements, exercised a power for which it had no authority under the laws of this state, and is continuing to perform the agreement on its part. In addition to a prayer for the forfeiture of the defendant's right to be a corporation, the state prays for such other relief as to the court may seem just and proper; and, in the opinion of the court, the defendant should be ousted from the power to make and perform the agreement set forth in the petition, or any part of it. And in this connection it is proper to say that, in the judgment of the court, if the company through its directors or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for it in the trust agreement, or should hereafter make such transfers, or should pay dividends to them instead of to the real owners of the shares, or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case it must be regarded and held as performing the agreement in violation of the judgment of this court.

Judgment ousting the defendant from the right to make the agreement set forth in the petition, and of the power to perform the same.

³⁰ The court then holds the action for forfeiture of charter barred by lapse of time.

SECTION 3.—UNITY OF OWNERSHIP

NORTHERN SECURITIES CO. v. UNITED STATES.

(Supreme Court of the United States, 1904. 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.)

Appeal from the Circuit Court of the United States for the district of Minnesota to review a decree enforcing, as against the defendants, the provisions of the anti-trust act against combinations in restraint of interstate or foreign commerce.

See same case below, 120 Fed. 721.

The facts are stated in the opinions.

Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, citizens of New York.³¹ * * *

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled, and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of states between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

* * *

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington, & Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of \$107,000,000

³¹ A part of the recital of the facts, much of the discussion of the legality of the combination, and all discussion of other questions are omitted.

of the \$112,000,000 total capital stock of the Chicago, Burlington, & Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific Railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington, & Quincy main line and branches.

Prior to November 13th, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of \$400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in article 6 of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power, but the duty, to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination, and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey. * * *

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company

acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management, and operation of said railway companies and in the receipt and control of their earnings." * * *

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the states or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce or any part of it. * * *

The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company, to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise * * * in restraint of commerce among the several states or with foreign nations"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory. * * *

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the states or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the states? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination, or conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the states or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress? * * *

We will not incur the opinion by extended extracts from the former opinions of this court [under the Sherman Act]. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several states or with foreign nations*;

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among *private* manufacturers or dealers,

whereby *interstate or international commerce* is restrained, are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international commerce* shall be governed, and, by the anti-trust act, has prescribed the rule of free competition among those engaged in such commerce:

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international commerce*; and,

That under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections. * * *

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States v. Joint Traffic Ass'n*: "Has not Congress, with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. * * * It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent

thereof, and acting as *one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." 171 U. S. 569, 571, 43 L. Ed. 287, 288, 19 Sup. Ct. 32. That such a rule was applied to interstate commerce should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several states when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive, but they show the circumstances under which the anti-trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain, such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare [citing *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 186; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558, 565, 23 Am. Rep. 190, 194; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672; *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171, 174; *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 269, 297, 8 L. R. A. 497, 506, 22 N. E. 798, 804; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 390, 18 Pac. 391; *India Bagging Ass'n v. Kock*, 14 La. Ann. 164].

The cases just cited, it is true, relate to the domestic commerce of the states. But they serve to show the authority which the states possess to guard the public against combinations that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in *Gibbons v. Ogden*, 9 Wheat. 197, 6 L. Ed. 70—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Is there, then any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce? If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that re-

strains such commerce by stifling competition among those engaged in it? * * *

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations—a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If anyone had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, “Why put the stocks of *both* these [constituent companies] into one holding company?” He frankly answered: “In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.” That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing, or (to use the words of this court in *United States v. Joint Traffic Ass’n*) “smothering” competition between the lines of two railway carriers. * * *

Mr. Justice HOLMES with whom concurred the CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice PECKHAM, dissenting:

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.³²

The first section makes “every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or com-

³² A part of this opinion is omitted, as is the dissenting opinion of Chief Justice White and the concurring opinion of Mr. Justice Brewer. Mr. Justice Peckham concurred in the two opinions first mentioned.

merce among the several states, or with foreign nations" a misdemeanor, punishable by fine, imprisonment, or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade—and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was, primarily, on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel v. Reynolds*, 1 P. Wms. 181. Of course, this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm. See *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249. All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes, or attempts to monopolize, commerce among the states; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of section 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of section 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed

to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in section 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement; and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 307, 24 Sup. Ct. 307. How effective the section may be or how far it goes is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An act to protect trade and commerce against unlawful restraints and monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come; and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25, following and affirming *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticize or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime, punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of section 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association's Case*.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the states, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing, or attempting to monopolize, some part of the commerce between the states. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the states. Of course, the statutes does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the states.

I assume that the Minnesota charter of the Great Northern, and the Wisconsin charter of the Northern Pacific, both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the states, had created a railroad company authorized singly to build all the lines in the states now actually built, owned, or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly, the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the states is unlawful. The supposed company would have owned lines that might have been competing; probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part.

But my answer has been indicated already. In the first place, size, in the case of railroads, is an inevitable incident; and if it were an objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place, in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from the greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case, and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly; in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. Ed. 849, 859, 16 Sup. Ct. 714, that since the statute, as before, the states have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a state at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete; and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a state for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many

shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

STANDARD OIL CO. v. UNITED STATES.

(Supreme Court of the United States, 1911. 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734.)

Mr. Chief Justice WHITE delivered the opinion of the court.

The Standard Oil Company of New Jersey and thirty-three other corporations, John D. Rockefeller, William Rockefeller, and five other individual defendants, prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of section 4 of the Act of July 2, 1890 (26 Stat. 209, c. 647, U. S. Comp. Stat. 1901, p. 3201), known as the Anti-Trust Act. * * * The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex, and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering 170 pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, * * * of California, * * * of Indiana, * * * of Iowa, * * * of Kansas, * * * of Kentucky, * * * of Nebraska, * * * of New York, * * * of Ohio, and sixty-two other corporations and partnerships, as also seven individuals, were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several states and territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, viz. John D. Rockefeller, William Rockefeller, and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows: "That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and

obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining and selling petroleum and its products among the various states, for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several states, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce organized in the year 1870 a corporation known as the Standard Oil Company of Ohio, and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination, and either transferred property to the corporation or to individuals, to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained, and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question, the following results were brought about:

(a) That the combination, in addition to the refineries in Cleveland which it had acquired, as previously stated, and which it had either dismantled to limit production, or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio, and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners, who had become stockholders in the Standard Oil

Company of Ohio, and thus members of the alleged illegal combination.

(b) That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York, and New Jersey.

(c) That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent. of the business of producing, shipping, refining, and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum, and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim: "That during the said second period of conspiracy the defendants entered into a contract and trust agreement, by which various independent firms, corporations, limited partnerships, and individuals engaged in purchasing, transporting, refining, shipping, and selling oil and the products thereof among the various states, turned over the management of their said business, corporations, and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce, and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination, and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin.³³

The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corporations in various states, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which, of course, in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination,

³³ The list is omitted.

that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of \$3,000,000 and the latter a capital stock of \$5,000,000, subsequently increased to \$10,000,000 and \$15,000,000, respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various states and territories of the United States, as aforesaid, to transfer their property situated in said several states to the respective Standard Oil Companies of said states of New York, New Jersey, Pennsylvania, and Ohio, and other corporations organized or acquired by said trustees from time to time. * * *" For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling, and shipping of oil," as per a list which is excerpted in the margin.³⁴

The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in sixty-four of the companies which it controlled to some of the remaining twenty companies, it having controlled before the decree eighty-four in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the attorney general of Ohio instituted contempt proceedings in the quo warranto case, based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time, also, proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe

³⁴ The list is omitted.

Line Company, an Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows: "That during the third period of said conspiracy, and in pursuance thereof, the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various states and territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended, "so that the business and objects of said company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and to hold, purchase, mortgage, and convey real estate and personal property outside the state of New Jersey.'"

The capital stock of the company—which, since March 19, 1892, had been \$10,000,000—was increased to \$110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of \$97,250,000. The bill contained allegations referring to the development of new oil fields; for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose

of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey, since 1899, had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which, during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of were continued. Without attempting to follow the elaborate averments on these subjects, spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts, and the limiting the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce, and which had monopolized the same, as alleged in the bill, be found to have existence, and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-Trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.⁸⁵

Certain of the defendants filed separate answers, and a joint answer

⁸⁵ The facts relating to a question of jurisdiction are omitted.

was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject, made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged, or of their purpose, intent, or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5 to 10, 1909, under the Expediting Act of February 11, 1903 (32 Stat. 823, c. 544, U. S. Comp. Stat. Supp. 1909, p. 1211), before a Circuit Court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-Trust Act, "except as evidence of their (the defendants') purpose, of their continuing conduct, and of its effect." 173 Fed. 177.

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under section 2 of the Anti-Trust Act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies, and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these thirty-eight corporate defendants being held to be parties to the combination found to exist.

The bill was dismissed as to all other corporate defendants, thirty-three in number, it being adjudged by section 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."

The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said thirty-seven subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Company, or permitting it to exercise any control over them by virtue of the stock ownership or

power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Company, and the thirty-seven subsidiary corporations, were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.³⁶

Following this course, we shall make our investigation under four separate headings: First, the text of the first and second sections of the act, originally considered, and its meaning in the light of the common law and the law of this country at the time of its adoption; second, the contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely; third, the application of the statute to facts; and, fourth, the remedy, if any, to be afforded as the result of such application.

*First. The text of the act and its meaning.*³⁷

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 318, 41 L. Ed. 1019, 17 Sup. Ct. 548, and cases cited), that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the 1st section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2d section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor, then first, to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the

³⁶ A ruling on jurisdiction and a statement of the contentions of counsel are omitted.

³⁷ For the text of the Sherman Act here quoted, see the Appendix.

law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-Trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution or allowance by the king by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' 3 Inst. 181."

Hawkins thus defined them:

"'A monopoly is an allowance by the King to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby any person is sought to be restrained from any freedom [of manufacturing or trading] which he had before.' Hawk. P. C. bk. 1, c. 79."

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English Constitution, is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly, as thus conceived, embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least, so far as the necessities of life were concerned, that individuals, by the abuse of their right to contract, might be able to usurp the power arbitrarily to enhance prices (one of the wrongs arising from monopoly), it came to be that laws were passed relating to offenses such as forestalling, regrating, and engrossing by which prohibitions were placed upon the power of

individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit, unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute 5 and 6 Edw. VI, c. 14, as follows:

"Whatsoever person or persons * * * shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in *East India Co. v. Sandys, Skinner*, 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Co. Inst. 181; F. B. 65; *Taylors de Ipswich v. Sherring*, 1 Rolle, Rep. 4; that the common law is as much against monopoly as engrossing; and that they differ only that a monopoly is by patent from the king, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. *Darcy v. Allen*, F. Moore, 673, 11 Coke, 84. The sole trade of anything is engrossing *ex rei natura*, for whosoever hath the sole trade of buying and selling hath engrossed that trade; and whosoever hath the sole trade to any country hath the sole trade of buying and selling the produce of that country, at his own price, which is an engrossing."

And by operation of the mental process which led to considering as a monopoly acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an in-

stitution or allowance * * * whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C. J., in *Mitchel v. Reynolds* (1711) 1 P. Wms. 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: (1) That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. (2) That as to necessities of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly—that is, an undue enhancement of price. (3) That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of, or being in restraint of, trade.

From the development of more accurate economic conceptions and the changes in conditions of society, it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statute of 12 George III, c. 71, enacted in 1772, and statute of 7 and 8 Victoria, c. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power

being restrained, prohibitions as to individuals were directed not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law.³⁸

³⁸ "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger from loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business. * * *

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. * * *

"This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and there-

The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul S. S. Co. v. McGregor*, [1891] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-Trust Act, it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part, if not all, of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it

fore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

"Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. * * * But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

"The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it. The cases assuming such a power in the courts are *Wickens v. Evans* (1829) 3 Younge & J. 318; *Collins v. Locke* (1879) 4 App. Cas. 674; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant Ch. (U. C.) 540 (1871); *Kellogg v. Larkin* (1851) 3 Pin. 123, 56 Am. Dec. 164; *Leslie v. Lorillard* (1888) 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456."

Per Taft, Circuit Judge, *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 et seq., 29 C. C. A. 141, 46 L. R. A. 122 (1898).

produced. The statement just made is illustrated by an early statute of the province of Massachusetts, that is, chapter 31 of the Laws of 1778-79, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject, or the many judicial decisions which illustrate it, would unnecessarily prolong this opinion. We append in the margin a note to treaties, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject. 2 Purdy's Beach, Priv. Corp. pp. 1403 et seq., chapter on Trusts and Monopolies.

It will be found that, as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. Ed. 689, 25 Sup. Ct. 379, and *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 52 L. Ed. 865, 28 Sup. Ct. 572; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or

other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending, as it did, upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the 1st and 2d sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary [citing cases].

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is, What was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint

of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibition of the second embrace "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations. * * *" By reference to the terms of section 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "in part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evo-

lution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless, before definitely applying that meaning, it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects, a much wider and in every view at least, a somewhat different, significance. And to do this brings us to the second question, which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute, and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract,

combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intentment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540, and *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25.³⁹

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio.
2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings

³⁹ The discussion of these cases is omitted.

in the supreme court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust, and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the situation as it existed at the time of the entry of the decree below, since, during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation, of course, had somewhat changed—a change which, when analyzed in the light of the proof, we think establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence; that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of sections 2 and 4 of the decree below, which are excerpted in the margin.⁴⁰

Giving to the facts just stated the weight which it was deemed they were entitled to, in the light afforded by the proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the “potentiality of competition” which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade, in violation of the first section of the act, but also to be an attempt to monopolize and monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect; that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and

⁴⁰ This marginal note is omitted.

its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the supreme court of Ohio, the tardiness or reluctance in

conforming to the commands of that decision, the methods first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated, and which among other things, impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other; and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects. * * *

*Fourth. The remedy to be administered.*⁴¹

The court below, by virtue of sections 1, 2, and 4 of its decree, * * * adjudged that the New Jersey corporation, in so far as it held the stock of the various corporations recited in sections 2 and 4 of the decree, or controlled the same, was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To make this command effective, section 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporations, or doing any act which would

⁴¹ The introductory part of the discussion of this point is omitted.

recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, section 6 of the decree enjoined them from in any way conspiring or combining to violate the act, or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By section 7, pending the accomplishment of the dissolution of the combination by the transfer of stock, and until it was consummated, the defendants named in section 1, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by section 9, among other things, a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section, and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of section 5 of the decree, which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by section 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, that the relief awarded was too broad:

a. Because it was not sufficiently specific, and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 404, 50 L. Ed. 526, 26 Sup. Ct. 272. Besides it is said that the restraint imposed by section 6—even putting out of view the consideration just stated—was, moreover, calculated to do injury to the public, and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the sub-

subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock, the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result.

Conceding the merit, abstractly considered, of these contentions, they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolved. In other words, we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest, it was obviously right. We think that, in view of the magnitude of the interests involved and their complexity, the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation, but by all the subsidiary companies, until the dissolution of the combination by the transfer of the stocks in accordance with the decree, should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.⁴²

⁴² The dissenting opinion of Mr. Justice Harlan is omitted.

UNITED STATES v. WHITING.

(District Court of the United States, 1914. 212 Fed. 466.)

MORTON, District Judge. These are two indictments against the same defendants for violating the Sherman Anti-Trust Law (26 Stats. 209). Indictment numbered 454 will be first considered. It is in two counts; the first charging a combination in restraint of trade, the second an attempt to monopolize trade and commerce in milk.

The allegations of the first count are, in substance, as follows:

The defendants Isaac Whiting, George Whiting, John K. Whiting, Charles H. Hood, Edward J. Hood, and William Graustein were, between May 26, 1905, and May 26, 1911 (when the indictment was found), continuously, willfully, knowingly, and unlawfully engaged in a combination in undue restraint of trade and commerce among the several states of the United States, by consulting, planning, and agreeing together in the combination hereinafter described in undue restraint of trade, which combination has restrained interstate trade in the manner set forth, and has been with unlawful intent.

The combination is described as follows:

Throughout the period specified, "a very extensive industry" has been carried on in and from the states of Maine, Vermont, New Hampshire, Massachusetts, and Connecticut, involving the purchase at divers places in said states of milk from the producers there, and the shipment of the milk so purchased to Boston and vicinity and to Worcester, and the sale thereof to various persons; 86 per cent. of all the milk purchased in the states above named, and so shipped to, and sold in, Boston and vicinity and in Worcester, has been purchased, shipped, and sold by three classes of persons, namely, the Whiting class (consisting of the above-named defendants by the name of Whiting), the Hood class (consisting of the above-named defendants by the name of Hood), and the Graustein class (consisting of the above-named defendant Graustein). These classes were under the control of the individual members thereof. In carrying on said industry the defendants shipped from the states named, to the points named, the milk so purchased by them. The Whiting class made purchases from producers at about 128 places throughout said states and shipped the milk so purchased to Boston and vicinity; the Hood class, at 142 places throughout said states, and shipped the milk so purchased to Charlestown, Forest Hills, and Lynn; and the Graustein class, at 92 places, and shipped the milk so purchased to Charlestown. The defendants, as a necessary feature of said industry, have respectively been carrying on interstate trade and commerce. Each class, had it not been for the unlawful combination between them in restraint of trade, would have been affected by the competition of the two other classes in the purchase of milk, and the producers who sold to the defendants would have benefited by such competition. No one class of the defendants

had or controlled a majority of said interstate trade in milk, but all of the classes working together did have a majority of that trade, namely, 86 per cent. thereof. Of this 86 per cent., the Whiting class controlled 48 per cent., the Hood class 44 per cent., the Graustein class 8 per cent. The defendants directed and controlled this 86 per cent. of the milk trade by and through certain copartnerships and corporations of which they were the actual and real managers. The purpose of this unlawful combination was to eliminate competition between the defendants in the purchase of milk from the producers.

The methods by which the defendants accomplished the objects of their unlawful combination and, by agreement between them, knowingly and unlawfully restrained interstate trade, is described as follows:

The different classes of defendants have, in pursuance of said agreement and combination between them to that end, refrained from competing with each other in the purchase of milk at the places named throughout the states aforesaid, and have conferred and agreed upon uniform prices to be paid by them each six months to the producers of milk for milk so purchased. The defendants, being extensive purchasers of milk, have been able, by reason of said unlawful agreement and combination, to purchase, and in fact have purchased, their milk at prices in the making of which competition has been greatly restricted, and which have been much lower than would have been the case had said agreement and combination not existed and had there been competition among the said classes of defendants with each other. The defendants entered into and carried out the agreement and combination described "with the intent to wrong the public and oppress and limit the rights of the milk producers in the states aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

Second count:

The second count is against the same defendants. It incorporates by reference the circumstances and conditions set forth in the first count, and charges that the defendants, by engaging in the unlawful combination described in the first count, "did knowingly attempt to monopolize part of the trade and commerce" among said states, "with the intent to wrong the public and to oppress and limit the rights of the milk producers in the states aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

The gravamen of both counts is a combination among the buyers of milk to eliminate competition inter se as to price only, and thereby to injure persons who had milk for sale.

It will be noticed that the scope of this indictment is narrower than in any previous case under the Sherman Act. Its omissions are significant. It does not undertake to describe conditions in the milk

business generally, either in the country or the city districts. It relates only to milk which is (a) bought at specified places in country districts, (b) for shipment to and sale in the vicinity of Boston or Worcester. It does not allege the total amount of milk produced and sold at the country places named, nor the total amount shipped therefrom, nor that sale for shipment to Boston or Worcester is the principal, or even an important, market for producers of milk at said places; nor is it alleged that the prices paid there for Boston or Worcester milk established or influenced other prices in the country markets. For example, if at any given place 1,000 gallons of milk were produced, 500 gallons of it might be sent to Springfield, 400 delivered to local creameries or consumers, and 100 sold for shipment to Boston or vicinity. The alleged combination affected only this last amount of 100 gallons. According to the indictment, only 86 gallons out of the 1,000 in the case supposed were bought and shipped by the defendants, i. e., an unimportant portion of the whole amount. The same may be true as to every place mentioned in the indictment; the Boston and Worcester trade, though "very extensive," may take but a small portion of the entire amount produced, and the price of the Boston and Worcester milk may not affect prices generally in the country markets.

It is not alleged that the defendants dominated or controlled the markets where they sold their milk; for aught that appears, they may have been unimportant factors therein. The indictment thus entirely fails to allege a domination or control of prices by the defendants, either in the buying trade in the country, considered as a whole, or in the selling trade in the cities. It does, however, show such domination of the buying trade in what is large enough to constitute a "very extensive industry."

No acts are alleged on the part of the defendants calculated to suppress competition from other purchasers, and no unfair or dishonest practices towards producers or consumers, unless the agreement in question be so regarded. It is not alleged that the prices agreed upon or paid were unreasonably low, but only that they were less than would have been the case had said restrictive agreement not been made. In this respect the present case is very different from the Nash Case (*Nash v. U. S.*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), the Swift Case (*Swift v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518), and the Patterson Case (*U. S. v. Patterson* [D. C.] 201 Fed. 697).

As to most, if not all, of the places named at which milk was bought, the indictment shows that only one of the classes of purchasing defendants bought there, and it is not alleged that at such points there ever was competition in purchasing by the other two classes of defendants, though it is alleged that there would have been such competition had the agreement covering prices never been made, and that the prices paid at such points were affected by the agreement and were less than would otherwise have been paid. For aught that appears to the con-

trary, the different classes of defendants may always have operated in distinct and separate districts, without competition among themselves, and have continued so to operate.

It may be true that, in the country places mentioned in the indictment, the most advantageous way to dispose of milk is to sell it for the Boston and Worcester market; that it is impracticable for individual producers to ship milk to Boston or Worcester; and that the three classes of defendants, by establishing prices which they would pay, practically dominated the country market. But that is not the situation described in this indictment.

Each of the defendants has demurred and each has assigned many grounds of demurrer. So far as they are merely formal or technical, they seem to me not well founded. I regard the indictment as sufficient in its technical and formal aspects, and as sufficiently informing the defendants of the offenses with which they are charged.⁴³

The crucial question, as it seems to me, is whether what the defendants are charged with having done constitutes a crime. Does the Sherman Act forbid an agreement among a substantial portion of the buyers in a certain interstate industry as to the price which they will offer or pay for a specified commodity? To reverse the question, is an agreement between a substantial proportion of the farmers in a given district, as to the price which they will charge middlemen engaged in interstate commerce for their milk, an unlawful combination, in the entire absence of any illegal purpose, or of any oppressive methods, or of any unreasonably high price? To what extent have competitors in interstate business the right to agree upon prices and eliminate competition inter se in respect thereto for their common advantage or protection?

It will be noticed that the indictment discloses no community of interest among the defendants, no general combination between them, no joint action for the purpose of coercing or injuring outsiders, but merely an agreement as to the price which they will offer and pay for milk; and that, except as to price, the defendants are free to compete with each other. It is not alleged that the exact prices agreed upon by the defendants became effective or were accepted by the sellers. The statements in the indictment as to the effect of the alleged combination are very guarded, and aver only that the price of milk to the producers was in fact lowered by reason of it. To what extent it was lowered is not alleged, nor, as before said, is it charged that the price agreed upon and paid by the defendants to the producers was unfair or oppressive; and it is nowhere explicitly stated that the sellers were under any sort of compulsion to deal with the defendants. Such compulsion is to be inferred, if at all, from the character and natural results of the alleged combination.

⁴³ A discussion of the constitutionality of the Sherman Act and of the interstate character of the acts in question is omitted, as are parts of the main discussion.

It may be said at once that the case is an exceedingly difficult one; and that the principles upon which it should be decided are by no means clearly settled. * * *

Whether an agreement restrains trade is a matter of law for the court to determine. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Joyce on Monopolies*, § 103 (collecting authorities).

That the alleged agreement not only restrained competition, but also restrained trade, seems clear. *Northern Securities Co. v. U. S.*, 193 U. S. 338 et seq., 24 Sup. Ct. 436, 48 L. Ed. 679; *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; *The Legal Aspect of Monopoly*, 20 Harv. Law Rev. p. 176 et seq. But that of itself, whatever may be the case at common law (as to which see *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; s. c. 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *Joyce on Monopolies*, § 89; and *Harding v. Am. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, elaborate notes collecting authorities), is not sufficient to warrant a conviction under the Sherman Act. Under this statute there must be not only a restraint of trade, but an undue restraint. In the *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, it was held, in substance and effect, that the restraint prohibited by the act must be an unreasonable one.

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. * * * Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." *White, C. J.*, *Standard Oil Case*, 221 U. S. at page 60, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. See, also, *Harlan, J.*, dissenting, at page 102 et seq. of 221 U. S., page 532 of 31 Sup. Ct., 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

In passing upon the question of unreasonable restraint, all the circumstances surrounding the alleged agreement or combination are to be taken into account, and, while the standard of conduct "in its na-

ture and theory is a question of law" (Holmes, J., *Le Roy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. 631 [February 24, 1914]), where the facts are in dispute the question will ordinarily be one for the jury to decide under suitable instructions.

The case therefore comes down to this: Whether upon the facts alleged in the indictment, which upon this demurrer must be taken to be true, a jury would be warranted in finding that there was an unreasonable restraint of trade by the defendants.

It is not possible to determine whether or not such a restraint of trade as is disclosed in this indictment is unreasonable, without having definitely in mind what constitutes a reasonable restraint of trade. See Stephen's Digest on Evidence (2d Am. Ed. by Chase) Introduction, pp. xvi and xvii. There is as yet no standard clearly established by statute or otherwise, applicable to a case of this character by which to determine the reasonableness or unreasonableness of the restraint in question. To say that an agreement is illegal if it is unreasonable does not, in the absence of a clearly understood standard, greatly advance the discussion. The presence or absence of competition and the manner in which it is or may be affected necessarily enter into the question.

* * *

In order to make a restraint unreasonable, it must, it seems to me, appear either (1) that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree, to the disadvantage of the public, the prices or supply of the product, commodity, or business which is the subject of the alleged restraint, and going beyond what is fairly required for the proper protection of the parties accused; or (2) that by means of a combination or agreement between the parties concerned, either by themselves alone or in connection with others, the price or supply of the product, commodity, or business, which is alleged to be the subject of undue restraint, is or may be affected to a substantial extent to the disadvantage of producers or purchasers, so as thereby to operate in a material degree to the injury of the public, and beyond what can fairly be said to constitute a proper protection for the parties to the alleged combination or agreement; or (3) that there has been direct and intentional interference with the transportation of commodities between the states.

Considering, on the one hand, the situation of the parties to the agreement, the possibilities of loss to them which unrestricted competition involved, and their right to protect themselves fairly against it, and, on the other hand, the public needs and the advantages to the public from unrestricted competition, it must appear that the defendants have done more than was fairly justified by reasonable self-protection, and have thereby obtained an unfair advantage in the trade in question. In the absence of unlawful intent and actual oppression a restraint of competition would hardly be deemed unreasonable, unless so wide and far-reaching as substantially to alter the general conditions

under which persons engaged in that trade in that district did business. A limited market and one nicely balanced as between buyers and sellers might be greatly disturbed by an agreement between only a few buyers or sellers, while a broader market might not be unfairly affected by a combination involving many persons and large amounts of goods.⁴⁴ * * *

What has been said so far applies to cases in which there was no unlawful intent, i. e., no intent to do more than protect the business of the contracting parties.

The intent charged in the indictment is: "To wrong the public and to oppress and limit the rights of milk producers in the states aforesaid by depriving said producers of the higher price for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

⁴⁴ "What are the ordinary marks of such a course of conduct as may properly be condemned as a restraint of trade? On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. And if these words are criticised as too general, we may reply that such generality is apparently unavoidable, as some recent legislation of Congress testifies, and, moreover, we may safely deny that the words are too vague for satisfactory use; for it must be remembered that the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application. They are not likely to be misapprehended or misapplied. Then, too, prices must not be arbitrarily fixed or maintained. Ordinarily the play of the great forces that influence the market will determine prices, and these forces must be allowed to have their unhindered effect. And a corollary from this consideration is that an artificial scarcity must not be produced, since the effect of such a scarcity is to raise prices to the consumer. Moreover, the public is also injured if quality be impaired, so that the old price buys a worse article; and other injuries are done, if the wages of the laborer be arbitrarily reduced, and if the price of raw material be artificially depressed.

"In the complexity of human affairs there may be other methods of unreasonably restraining trade, and these may be left for consideration as they are made to appear; but those already referred to are the methods that have usually been employed, and we need not enter the field of conjecture. Now, if all or some of these marks of unlawful restraint be present or may fairly be expected, the statute [the Sherman Act] requires the application of an appropriate remedy; but if none of them be present, after sufficient experience has shown what will actually happen, on what satisfactory ground is condemnation to be pronounced? Not, we think, merely on the ground of size. As population has swelled, and as vast aggregations of men have multiplied their wants, the inevitable trend of modern affairs has called for large business enterprises as well as for small; and we think it no more than reasonable to say that when a large business has proved itself to be beneficial and not harmful to the community, it should not be condemned merely because it is large. We do not consider, and we do not deny, the right of a nation to adopt such a legislative policy in this respect as its constitution may permit; but, until a policy of limitation be so adopted, we see no possible test of reasonableness to be applied except such tests (and those like them) as have already been sufficiently referred to. And, from whichever side the subject may be approached—from the side of what is likely to happen, or from the side of actual experience—the standard or reasonableness should be applied according to the facts and circumstances of the particular case under examination."

Per McPherson, Circuit Judge, in *United States v. Keystone Watch Case Co.* (D. C.) 218 Fed. 502, 518 et seq., *passim* (1915).

While I do not think it necessary to decide whether this allegation of intent adds anything to the indictment, it seems to me at least doubtful whether it does so. If the defendants had a right to agree to refrain from competition in price, their intent to deprive the public of the advantages of competition inter se would not be an unlawful one. It is perhaps true that an agreement which might be valid if made by the defendants for their own advantage would be illegal if made for the purpose of oppressing the public; in other words, if it was a purely malicious, and not a selfish, affair—but the combination alleged is plainly not of that character. The great doubt about the case is whether any combination can be found to be an unreasonable restraint of trade in the absence of coercive methods, of monopolistic control over some commodity or service, and of intent to exclude others from the industry in question—matters which have been to some extent relied on by the Supreme Court in decisions under this statute. *Standard Oil Case*, 221 U. S. 1, 75, 76, 77, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *U. S. v. St. Louis Terminal Co.*, 224 U. S. 383, 395, 32 Sup. Ct. 507, 56 L. Ed. 810; *U. S. v. Winslow*, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481. It seems to me, however, that the elements referred to, while usually present in such cases, are not essential.

Applying these views of the law to the case at bar: Here is a well-defined and extensive industry consisting on the one side of producing milk and selling it, and on the other side of buying it and shipping it to Boston and vicinity and Worcester. Eighty-six per cent. of the buying side of this industry was in the hands of these defendants. For them to agree upon prices which they would pay, and thereby to eliminate practically all competition as to price among buyers, may be found to have so seriously affected the conditions under which all persons engaged in that industry did business as to be an unreasonable restraint of trade. It is true that the milk produced might have been sold through other channels; but it is also true, as a matter of common knowledge, that it takes time to divert business from one channel into another. The sellers ought not to be compelled either to find other outlets for their product, or to await the re-establishment of competition among buyers, being obliged meanwhile to sell their output at prices affected, if not established, by the combination of buyers, and in the making of which competition had been practically eliminated.

On the day after this agreement went into effect, what was the producer of milk to do with his product? His choice was either to take the uncompetitive price obtainable, or, with a perishable product, to start in to hunt up other markets for it. He ought not to be put into that position. He was not entitled to a continuance of all the competition that had existed the day before, in the channel through which he was accustomed to dispose of his goods; but, as one of the public, he was entitled not to have all effective competition as to prices

in that channel suddenly suppressed by agreement between 86 per cent. of the buyers therein. The fact that the alleged agreement does not appear to have been used oppressively is not sufficient to save it. In cases of restraint of trade or monopoly not arising under the Sherman Act, the prevailing view (although there has been some difference of opinion on this point) is that the potential evils of a monopoly or dominating control in any trade are sufficient to invalidate agreements having that purpose or result without proof of actual injury or evil result. *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. The reasoning of these cases seems applicable to present conditions; and where the purpose or result of an agreement is to give the parties thereto a monopoly of any commodity, or a dominating control in any trade, the agreement would seem, *prima facie* at least, to be unreasonably extensive and therefore illegal.

It may be that the trade in milk for the Boston and Worcester markets was so closely interwoven with the general business of producing and selling milk that the agreement alleged may, upon a trial of this indictment, be found not to have substantially and unfairly limited the rights of the producers, because they still had other sufficient markets for their product which were not affected by the combination between these defendants, nor to have conferred upon the parties to it any real domination or control of prices, and to have been only a fair limitation as between themselves of what would otherwise have been destructive competition. But there are limits to the right of collective bargaining, and, upon the facts stated in the indictment, it seems to me that the alleged combination might be found to have been unreasonably extensive and an unreasonable restraint of trade.

As to the second count of this indictment:

This count charges, as has been said, an attempt to monopolize trade. In all such cases which have heretofore come before the courts under the Sherman Act, there was on the part of the defendants ownership or control of the commodity. Upon such facts, there was no necessity for a sharp distinction between a combination in restraint of trade and a monopoly. No case has been found under that act in which a charge of attempted monopoly was based on an agreement among buyers only, without regard to the market in which they resold. As has been pointed out, there is no allegation, express or implied, in this indictment that these defendants dominated or controlled the markets in which they sold their milk. A "monopoly," both at common law and under this statute, implies, I think, the control of goods or service which the public desires to obtain. An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged "by means which prevent other men from engaging in fair competition with him." *Re Greene* (C. C.) 52 Fed. 116; *Joyce on Monopolies*, §§ 65-69. There may be, I think, an unreasonable restraint of trade which does not constitute a monopoly; though

there can be no monopoly which does not constitute an unreasonable restraint of trade.

The business of these defendants was buying milk from the producers and selling it again to the public. The only way in which the combination alleged could in any way tend to enlarge their control of that business was by forcing down the price at which they bought, so that they would be able to undersell their competitors in the selling market. No facts are alleged from which any such purpose or intent can be inferred. It is not apparent how the alleged agreement as to buying prices would tend in any way to enlarge the defendants' control of their buying market, or to exclude competitors therefrom. Its natural effect would seem to be just the reverse. The indictment alleges that the agreement was made "with the intent to wrong the public and to oppress and limit the rights of milk producers * * * by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants." There can be no monopoly unless there is something which is monopolized. These defendants combined no tangible property, nor any control of tangible property. What they had was the ability and willingness to buy milk. It is not unlike a combination not to bid, or to bid only an excessive price, for public work, which has been held illegal, but which is certainly not a monopoly. *Gibbs v. Smith*, 115 Mass. 592 (but compare *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa, 574, 87 N. W. 496). The manifest purpose of the agreement set out was to eliminate competition as to price in buying between the defendants; and, upon the facts alleged, no other intent or purpose can be discovered.

This count therefore seems to me not to charge a crime.

As to indictment No. 453:

This indictment charges a conspiracy in restraint of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was bought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been unimportant factors in each one. This indictment would have been good if no question of reasonableness were open. *U. S. v. Addyston Pipe Co.*, supra. But under the Sherman Act that question is open, and the indictment must, as above explained, allege facts warranting a finding by the jury that the restraint was unreasonable. The facts alleged do not justify such a conclusion, and no crime is therefore charged. Everything which this indictment sets out may be true, and still the combination or conspiracy may not have extended beyond what was reasonable, nor have unduly affected the conditions under which other persons engaged in that industry, either buying or selling, did business.

In *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96, the indictment charged, in substance, that the five defendants did "combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances, and acts, unlawfully to regulate the price at which coal should be sold in the said city of Providence, * * * which said coal was then and there an article of prime necessity to the public and the consumers thereof."

The defendants demurred, and the court sustained the demurrer, holding that monopoly was the gist of the common-law offense, and that, as it did not appear from the indictment that the defendants had any power of control over the coal trade, they could not create a monopoly. The case raised the question whether every agreement to regulate the price of a prime necessary of life was criminal at common law; and the court, in sustaining the demurrer, decided that this was not so. The decision implies that under some circumstances such agreements may lawfully be made. * * *

The result is:

That indictment No. 453 is adjudged insufficient in law, the demurrers thereto are severally sustained, and the defendants go therefrom without day.

That indictment No. 454 is adjudged sufficient in law as to the first count thereof, that the demurrers to said count are severally overruled, and that the defendants are given leave to plead to said count on or before April 1, 1914.

That indictment No. 454 is adjudged insufficient in law as to the second count thereof, that the demurrers to this count are severally sustained, and that the defendants go therefrom without day.

UNITED STATES v. UNITED STATES STEEL CORPORATION.

(Supreme Court of the United States, 1920. 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121.)

Mr. Justice McKenna delivered the opinion of the court.

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act. * * *

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly. * * *

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel industry, 12 in number. There are, besides, other corporations and individuals more or less connected in the activities of the other defendants, that are alleged to be instruments or accomplices in their activities and offendings, and that these activities and offendings

(speaking in general terms) extend from 1901 to 1911, when the bill was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges. * * *

The case was heard in the District Court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. (D. C.) 223 Fed. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions, practically a compulsion from "the metallurgical method of making steel and the physical method of handling it," this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action. And the concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed an important purpose of the organization was the building up of the export trade in steel and iron which at that time was sporadic, the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation, but concentration of efforts, with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it was expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned and, while conceding that the Steel Corporation after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion, by Judge Woolley and concurred in by Judge Hunt (223 Fed. 161), was in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary,

that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation became "a combination of combinations by which, directly or indirectly approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80 per cent. or 90 per cent. of the entire output of the country, and that its purpose was to secure great profits which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.

The organizers, however, (we are still representing the opinion) underestimated the opposing conditions and at the very beginning the corporation instead of relying upon its own power sought and obtained the assistance and the co-operation of its competitors (the independent companies). In other words the view was expressed that the testimony did "not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in co-operation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary Dinners." The dinners were congregations of producers and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but their potency being demonstrated they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn the corporation's prices were controlled by competition.

The corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employes—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below these maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and

in its competition it seemed to make no difference between large and small competitors. Indeed it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs and was distinguished from "theirs only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, does not adequately represent their ability and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed.⁴⁵

We state the contentions, we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the District Judges, and we may well despair to supplement the force of their representation of the conditions antecedent to the formation of the corporation, and in what respect and extent its formation changed them. Of course, in that representation and its details there is guidance to decision, but they must be rightly estimated to judge of what they persuade. Our present purpose is, not retrospect for itself, however instructive, but practical decision upon existing conditions that we may not by their disturbance, produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration should be of, not what the corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced—whether its dissolution, as the government prays, or the dismissal of the suit, as the corporation insists.

The alternatives are perplexing, involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen, that the judges of the District Court unanimously concurred in the view that the corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed; not against an expectation of it, but against its realization, and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor—it was not greater than that posses-

⁴⁵ A more extended statement of these contentions is omitted.

sed by all of them. Monopoly, therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the corporation) until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the test for which *Swift & Co. v. United States*, 196 U. S. 396, 25 Sup. Ct. 276, 49 L. Ed. 518, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood, or were underestimated, and the case is not peculiar. And we may say in passing that the government cannot fear their resumption, for it did not avail itself of the offer of the District Court to retain jurisdiction of the cause in order that, if illegal acts should be attempted, they could be restrained.

What, then, can now be urged against the corporation? Can comparisons in other regards be made with its competitors and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the District Court unanimously resolved against the existence of that power, and in doing so they but gave effect to the greater weight of the evidence. It is certain that no such power was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretense, and the corporation, declined in productive powers—the competitors growing either against or in consequence of the competition. If against the competition we have an instance of movement against what the government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the corporation under either illustration is an untenable accusation.⁴⁶

Besides the circumstances which we have mentioned there are others

⁴⁶ A discussion of some of the government's illustrations of the corporation's purpose is omitted.

of probative strength. The company's officers, and, as well its competitors and customers testified that its competition was genuine, direct, and vigorous and was reflected in prices and production. No practical witness was produced by the government in opposition. Its contention is based on the size and asserted dominance of the corporation—alleged power for evil, not the exertion of the power in evil. Or, as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the government, the offense against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the corporation. Competitors, it is said, followed the corporation's prices, because they made money by the imitation. Indeed, the imitation is urged as an evidence of the corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the corporation—"its extensive control of the industry is such that the others [independent companies] follow."

Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the corporation and the independents. Counsel say: "They [the corporation is made a plural] called a few—they called 200 witnesses out of some 40,000 customers—and they expect with that customer evidence to overcome the whole train of price movement shown since the corporation was formed." And by "movement of prices," counsel explained, "as shown by the published prices, * * * they were the ones that the competitors were maintaining all during the interval."

It would seem that "200 witnesses" would be fairly representative. Besides the balance of the "40,000 customers" was open to the government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics, whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employé in the Bureau of Corporations. His deduction was that, when prices are constant through a definite period, an artificial influence is indicated; if they vary during such a period, it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction, equivocal of itself, even though the facts it rests on or asserts were not contradicted. If

the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course, competition affects prices; but it is only one among other influences, and does not, more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers, and customers of the corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices, and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power, not of weakness, and power exerted, not only to suppress competition, but to compel testimony, is the necessary inference, shading into perjury, to deny its exertion? The situation is indeed singular, and we may wonder at it, wonder that the despotism of the corporation, so baneful to the world in the representation of the government, did not produce protesting victims.

But there are other paradoxes. The government does not hesitate to present contradictions, though only one can be true; such being, we were told in our schoolbooks, the "principle of contradiction." In one, competitors (the independents) are represented as oppressed by the superior power of the corporation; in the other, they are represented as ascending to opulence by imitating that power's prices, which they could not do, if at disadvantage from the other conditions of competition, and yet confederated action is not asserted. If it were, this suit would take on another cast. The competitors would cease to be the victims of the corporation, and would become its accomplices. And there is no other alternative. The suggestion that lurks in the government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The government, therefore, is reduced to the assertion that the size of the corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or, as the government says, "the combination embodied in the corporation unduly restrains competition by its *necessary effect* [the italics are the emphasis of the government], and therefore is unlawful regardless of purpose." "A wrongful purpose," the government adds, is "matter of aggravation." The illegality is static; purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant, because of the dominance attained? To such paternalism the government's contention, which regards power, rather than its use, the determining consideration,

seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

We have pointed out that there are several of the government's contentions which are difficult to represent or measure, and the one we are now considering—that is, the power is “unlawful regardless of purpose”—is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal, because there is potency in it for mischief. The regression is extreme, but short of it the government cannot stop. The fallacy it conveys is manifest.

The corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offense against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it, except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade, nor complaints by customers—how can it be worked out of the situation, and through what proposition of law? Of course it calls for nothing other than a right application of the law, and, to repeat what we have said above, shall we declare the law to be that size is an offense, even though it minds its own business, because what it does is imitated? The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the government, and in connection with them, we recall the distinction we made in the *Standard Oil Case*, 221 U. S. 1, 77, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, between acts done in violation of the statute and a condition brought about which “in and of itself, is not only a continued attempt to monopolize, but also a monopolization.” In such case, we declared, “the duty to enforce the statute” required “the application of broader and more controlling” remedies than in the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of “the combination found to exist in violation of the statute” in order to “neutralize the extension and continually operating force which the possession of the

power unlawfully obtained" had "brought" and would "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies, and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal, and became a "continually operating force" with the "possession of power unlawfully obtained."

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed; whatever there was of evil effect was discontinued before this suit was brought, and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies, and equally clear in its direction that the courts of the nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions, and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed, essential function—that makes its value in our jurisprudence—value in this case as in others. We do not mean to say that the law is not its own measure, and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a matter for consideration that there was no legal attack on the corporation until 1911, 10 years after its formation and the commencement of its career. We do not, however, speak of the delay simply as to its time, or say that there is estoppel in it because of its time, but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken; the investments by the public that have been invited and are not to be ignored. And what of the foreign trade that has been developed and exists? The government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that under congressional legislation in the Webb Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8836 $\frac{1}{4}$ c-8836 $\frac{1}{4}$ e) the foreign trade of the corporation is reserved to it. And further, it is said, that the corporation has constructed a company called the Products Company, which can be "very easily preserved as a medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act."

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world, and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the corporation be sustained, and its power of control over its subsidiary companies be retained and exercised in the foreign trade, and given up in the domestic trade? The government presents no solution of the problem. Counsel realize the difficulty, and seem to think that its solution or its evasion is in the suggestion that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action under existing laws, not action under conceptions which may never be capable of legal execution. We must now decide, and we see no guide to decision in the propositions of the government.

The government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business.⁴⁷ They are fully integrated, it is said—possess their own supplies, facilities of transportation, and distribution. They are subject to the Steel Corporation, is in effect the declaration, in nothing but its control of their prices. We may say parenthetically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expedients of the law.

But let us see what guide to a procedure of dissolution of the corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the government calls for, not only a disruption of present conditions, but the restoration of the conditions of 20 years ago, if not literally, substantially. Is there guidance to this in the Standard Oil Case and the Tobacco Case, 31 Sup. Ct. 632, 55 L. Ed. 663? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal

⁴⁷ A list of these companies is omitted.

power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them, and this reference to them is enough. And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." It was further said what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent * * * and impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how in the case of the New Jersey corporation the original wrong was reflected in and manifested by the acts which followed the organization, as described by the court. It said:

"The exercise of the power which resulted from that organization fortifies the foregoing conclusions (as to monopoly, etc.), since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted, by which the country was divided into districts and the trade in each district in oil was turned over to the designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The Tobacco Company Case (31 Sup. Ct. 632, 55 L. Ed. 663) has the same bad distinctions as the Standard Oil Case. The illegality in which it was formed [there were two American Tobacco Companies, but we use the name as designating the new company as representing the combinations of the suit] continued—indeed, progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion, if not its direct assertion, that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war "inspired by one or more of the minds which brought about and became parties to that combination." In other words, the purpose of the combination was signaled to competitors, and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven "out of the business." This was the purpose, and the achievement, and the processes by which achieved, this court enumerated to be the formation of new companies, taking stock in

others to "obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants, not to utilize them, but to close them; by constantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders, or employés, were required to bind themselves, generally for long periods, not to compete in the future. In the Tobacco Case (31 Sup. Ct. 632, 55 L. Ed. 663), therefore as in the Standard Oil Case, the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the Standard Oil Case furnishes no example for a decree in this.

In conclusion, we are unable to see that the public interest will be served by yielding to the contention of the government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.⁴⁸

Mr. Justice McREYNOLDS and Mr. Justice BRANDEIS took no part in the consideration or decision of the case.

UNITED STATES v. READING CO.

(Supreme Court of the United States, 1920. 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760.)

Suit by the United States against the Reading Company and others. From a decree granting insufficient relief (226 Fed. 229), the United States appeals, and defendants also appeal.

Mr. Justice CLARKE delivered the opinion of the Court.

These are appeals from a decree entered in a suit instituted by the government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they constitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopoly.

⁴⁸ The dissenting opinion of Mr. Justice Day, in which Mr. Justice Pitney and Mr. Justice Clarke concurred, is omitted.

zation of such trade and commerce in violation of the first and second sections of the Anti-Trust Act of Congress, of July 2, 1890 (26 Stat. 209 [Comp. St. §§ 8820, 8821]); and also for the alleged reason that the defendants, Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, are violating the commodities clause of the act of Congress of June 29, 1906 (34 Stat. 585 [Comp. St. § 8563(6)])⁴⁹ * * *

Reference to the history of the properties now controlled by the Holding Company [Reading Company] will be of value for the assistance it will be in determining the intent and purpose with which the combinations here assailed were formed. *Standard Oil Co. v. United States*, 221 U. S. 1, 46, 76, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

The Philadelphia & Reading Railroad Company was chartered by special act of the Pennsylvania General Assembly in 1833 (P. L. 144), and it conducted the business of a railroad carrier prosperously for about 30 years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the company for 1870 contains the following:

"Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired and will be held by an auxiliary company known as the Philadelphia & Reading Coal and Iron Company of which the Philadelphia & Reading Railroad Company is the only stockholder. The result of this action has been to secure—and attach to the company's railroad—a body of coal land capable of supplying all the coal tonnage that can possibly be transported over the road for centuries."

And this is from the report for 1880:

The transportation of coal has always been a source of great profit to the railroad company and the only doubt in the past as to the permanency of the earning power of the company as a transporter was due to the fear that rival companies would tap the Schuylkill region and divert the coal tonnage to their own lines. *This danger was happily averted by the purchase of the coal lands.*"

And this from the report of 1881:

"The coal estates of the Philadelphia & Reading Company * * * consist of 91,149 acres (142 square miles) of coal lands, which is sixty per cent. of all the anthracite lands in the Schuylkill district, and thirty per cent. of all in Pennsylvania."

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

"The coal lands comprise in extent about thirty-three per cent. of the entire anthracite coal fields of the state, and taking into account the

⁴⁹ No part of the opinion relating to the second charge is given. Much relating to the first charge is omitted.

aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions which has been going on for many years, it must be conceded that we have *at least fifty per cent. of the entire deposit remaining unmined.*"

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthracite carriers, competing with the Reading and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds and receivers were appointed who operated both properties until 1896 when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

First. To the Reading *Railway* Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of the equipment) which had been owned or leased by the former Reading *Railroad* Company. The capital stock of this company was fixed at \$20,000,000 and it issued \$20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at \$90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite—more than one-fifth of the then total production of the country. But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars and ships, owned by the former Railroad Company, and its tidewater terminals at Philadelphia and on New York Harbor were allotted to the Holding Company.

Second. By the decree of sale the Reading Coal & Iron Company was released from its former obligations and to it thus freed the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition that it would deliver

all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for \$135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased—almost two-thirds of the entire acreage of the Schuylkill coal field—stocks and bonds in other coal companies, coal in storage and other property, all of the estimated value of \$95,000,000.

Third. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the General Assembly of Pennsylvania, but unused for 20 years, was utilized. This charter was of the class denominated "omnibus" by the Supreme Court of Pennsylvania, and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed to "Reading Company," its capital stock was increased from \$100,000 to \$140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned by the Reading *Railroad* Company, together with stocks which gave it control of more than 30 short line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railroad* Company and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal & Iron Company, was that the Holding Company without any outlay—solely because the creditors and stockholders of the former Reading *Railroad* Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of \$34,400,000; plus all of the capital stock and bonds of the new Railway Company, \$40,000,000; plus all of the capital stock of the Coal Company, \$8,000,000, and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds and mortgages owned by the former Railroad Company of the estimated value of over \$38,000,000—making a total value, as represented at the time to the New York Stock Exchange, of \$193,613,000.

Thus, this scheme of reorganization, adopted and executed 6 years after the enactment of the Anti-Trust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets.

This board of directors, obviously, thus acquired power: To increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

Obviously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading Railway Company and the Reading Coal Company each had thereafter but one stockholder—the Holding Company—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating \$28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of \$135,000,000 and its capital stock of \$140,000,000. The Holding Company thus served to pool the property, the activities and the profits of the three companies. *Northern Securities Co. v. United States*, 193 U. S. 197, 327, 362, 24 Sup. Ct. 436, 48 L. Ed. 679.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

In 1898 this Holding Company entered into a combination with five other anthracite carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater, which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders for the purpose of providing \$5,000,000 with which the properties of the chief independent operators, Simpson and Watkins, were purchased and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise and that company, although only one of six, became responsible for 30 per cent. of the required financing. In *United States v. Reading*, 226 U. S. 324, 351, 33 Sup. Ct. 90, 96 (57 L. Ed. 243), this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

"The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at page 355 of 226 U. S., at page 97 of 33 Sup. Ct. (57 L. Ed. 243):

"We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for

the purpose of restraining commerce among the states in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated or which might thereafter be opened and operated," and to pay therefor 65 per cent. of the average price of coal prevailing at tidewater points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: That they were made for the purpose of eliminating the competition of independent operators from the markets and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed"; that before these contracts, there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants, but that after the contracts were made "such competition was impracticable"; that the case fell well within not only the Standard Oil and Tobacco Cases, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally that the defendants had combined, by and through the instrumentality of the 65 per cent. contracts with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within 2 years and again within 4 years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and of corporate agency, for the purpose of violating, in a flagrant manner, the Anti-Trust Act of 1890.

Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite—almost one-half of its total freight traffic. Its capital stock was then \$27,436,000 and its funded debt was \$46,881,000.

This Central Company owned, at the time, in excess of eleven-twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over \$9,000,000 and a funded debt of about \$17,000,000. And that company owned or had leased in excess of 14,000 acres of coal bearing lands—13,000 acres in the Wyoming field—and in the

year ending June 30, 1913, it shipped from its lands thus owned or controlled 6,243,000 tons of coal, which was sold for over \$20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the commencement of this suit, and from one-third to one-half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading System were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris: * * *

Thus, by this purchase, the Reading Holding Company acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies, in the country. The anthracite tonnage of the Central and Reading Railway Companies thus combined, exceeded, at the time, 18,000,000 tons—over one-third, of the then total production of the country—and the revenue derived from it was more than one-third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "Rates, practices, rules and regulations governing the transportation of anthracite coal," which had been in progress for 3 years. The 11 initial anthracite carriers which have lines penetrating the coal producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the commission found: That since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of co-operation or combination among the carriers; and that they were excessive to such an extent that material reductions, by all of the carriers were ordered, including, of course, those of the Central and Reading Companies. The commission also found, and this appears in the record of this case, that the Reading Coal Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding \$68,000,000 for advances of capital made by the Reading Railroad Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than \$30,000,000 of equaling 4 per cent. per annum on the indebtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company and unusual credits had been allowed the latter in the payment of its

freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted save as to some findings of the Interstate Commerce Commission, we must proceed to judgment, and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it. * * *

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading Companies, the Central Railroad Company of New Jersey and the Wilkes-Barre Coal Company.

Before the reorganization of 1896 the gathering of more than two-thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation and sale of the anthracite coal of the largest of the three sources of supply.

When in 1896 the problem was presented of reorganizing the financial affairs of the two companies, it was not solved as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the contrary, and very obviously for the purpose of evading the provision of the Constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Constitution of Pennsylvania 1874, art. 17, § 5), and also of evading the provisions of the federal Anti-Trust Act against restraining and monopolizing interstate commerce, resort was had to the Holding Company device, by which one company was given unrestricted control over the other two, with the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when in 1901 a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal carrying system, with its extensive coal owning and mining subsidiary. This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers but also over two great competing coal companies, engaged extensively in mining and selling anthracite

coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act has been frequently held by this court.

Thus, in *Northern Securities Co. v. United States*, 193 U. S. 197, 327, 24 Sup. Ct. 436, 452 (48 L. Ed. 679), when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise * * * in restraint of commerce among the several states or with foreign nations'—or could more effectively and certainly suppress free competition between the constituent companies. * * * *The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.*"

And again, in *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 88, 33 Sup. Ct. 53, 58 (57 L. Ed. 124), decided 9 years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. * * * Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when discussing a similar state Anti-Trust Act in *International Harvester Co. v. State of Missouri*, 234 U. S. 199, 209, 34 Sup. Ct. 859, 862 (58 L. Ed. 1276, 52 L. R. A. [N. S.] 525), it was said:

"The specification under this head is that the Supreme Court [of Missouri] found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by*

*good intentions and has had some good effect. * * ** The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-Trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time, successfully until this court condemned the 65 per cent. contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad System, and also of the two coal companies, thus effectually suppressing all competition, between the four companies and pooling their earnings. It is difficult to imagine a clearer case and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by *United States v. Union Pacific R. R. Co.*, supra.

For flagrant violation of the first and second sections of the Anti-Trust Act, the relations between the Reading Company, the Reading Railway Company and the Reading Coal Company and between these companies and the Central Railroad Company of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of either of the other corporations.⁵⁰

UNITED STATES v. UNION PACIFIC RAILROAD CO.

(Supreme Court of the United States, 1913. 226 U. S. 470, 33 Sup. Ct. 162, 57 L. Ed. 306.)

Mr. Justice DAY delivered the opinion of the court.

On December 2, 1912, this court handed down an opinion and remanded this case to the District Court of the United States, whence it came, with instructions to enter a decree which would provide an injunction as to voting the stock of the Southern Pacific Company, acquired by the Union Pacific Railroad Company, and directed the court to further hear the parties in order to make a decree effectually concluding the operating force of the combination created by the purchase of the Southern Pacific Company's stock. The parties were given

⁵⁰ The dissenting opinion of Mr. Chief Justice White, with whom Mr. Justice Holmes and Mr. Justice Van Devanter concurred, is omitted.

three months from the receipt of the mandate of this court by the District Court to propose plans, and it was directed that any one adopted by the court should be such as would effectually dissolve the unlawful combination.

The mandate of this court not having issued, on December 19, 1912, a motion was made in which the Attorney General of the United States and counsel for the appellees the Union Pacific Railroad Company and the Oregon Short Line Railroad Company (the latter holding the stock for the Union Pacific Company) joined in asking this court "to instruct the United States District Court for the District of Utah, by a provision incorporated in the mandate of this court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees, to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912." * * *

The Southern Pacific Company's stock, held by the Oregon Short Line Company for the Union Pacific Company, amounts to \$126,650,000, par value, in shares of \$100 each, and constitutes 46 per cent. of the Southern Pacific Company's stock; enough, as we have heretofore found, to effectually control the Southern Pacific Company. As stated by the appellees, the Union Pacific Company has outstanding \$99,569,300, par value, of preferred stock, and \$216,646,300, par value, of common stock, all in shares of \$100 each, amounting in all to \$316,215,600, and also has outstanding \$37,000,000 of bonds convertible into stock, and the appellees further state that its stock is distributed among over 22,000 holders.

It is contended on behalf of the appellees that the distribution of the Southern Pacific Company's stock, held, as we have stated, by the Oregon Short Line Company for the Union Pacific Company, among so many stockholders, will effectually conclude the combination decreed to be ended by the former order of the court. It is insisted that such distribution will prevent the continued operation of the combination for the control of the Southern Pacific Company by a competing company, which the Union Pacific Company was found to be, and that it is authorized under the practice in respect to such decrees, as settled by the previous decisions of this court in affirming the decree of the Circuit Court in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436, and *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. 493, and the decree of the Circuit Court in *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734.

In the *Northern Securities Co.* Case, after providing for orders of injunction to prevent the continued operation of the Northern Se-

curities Company, which controlled the Northern Pacific Railway Company and the Great Northern Railway Company, it was provided:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the [stockholders of the] Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." 193 U. S. 355, 48 L. Ed. 707, 24 Sup. Ct. 436.

Upon the affirmation of this decree by this court in 193 U. S. 197, the Northern Securities Company proceeded to reduce its outstanding capital stock from \$395,400,000 to \$3,954,000, providing for such reduction by requiring each holder to surrender to the company for retirement 99 per cent. of the shares held by him, and upon surrender by a stockholder the company assigned and transferred to him proportionate amounts of the stock of the Northern Pacific Company and Great Northern Company, which had been placed with the Northern Securities Company, the holding company, for the purpose of creating the combination, which the court had held to be illegal, and this plan of distribution was approved by this court in 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. 493. In other words, the stock of the holding company was reduced and surplus of assets created by such reduction, the stock of the Northern Pacific Company and the Great Northern Company, was distributed among the stockholders of the Northern Securities Company, thereby effectually ending the combination.

In the Standard Oil Co. Case the majority of the stock of nineteen oil companies had been placed in the control of a holding company, the Standard Oil Company of New Jersey, with a capital stock of \$100,000,000, the stock of the latter corporation being issued to the holders of the stock in the nineteen companies in exchange for their stock. This holding company was held to be a combination and conspiracy in restraint of trade and commerce, and, after awarding injunctions, it was provided:

"But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination." 173 Fed. 199.

It is evident in that case, as in the Northern Securities Co. Case, that the distribution of the shares and stocks of the subsidiary companies, parties to the combination, among the shareholders of the Standard Oil Company of New Jersey, was to end the combination

which had been decreed to be in violation of law, and prevent the continued control of the subsidiary companies by the holding company.

As was said in the opinion filed in this case, however, each case under the Sherman Act (26 Stat. 209, c. 647, U. S. Comp. Stat. 1901, p. 3200) must stand upon its own facts; and we are unable to regard the decrees in the Northern Securities Co. Case and the Standard Oil Co. Case as precedents to be followed now, in view of the different situation presented for consideration.

The Southern Pacific Company's stock was mainly purchased from private parties, legatees of the Huntington estate, and it is evident that it is impossible to restore the status quo by the return of such stock to the persons from whom it was purchased upon such vendors refunding the purchase money.

The plan proposed in the present motion, of distributing the stock among the shareholders of the Union Pacific Company, or of selling it to such shareholders, will, in effect, transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders, and arises from their power to choose the governing board of directors. Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. *Union P. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 597, 41 L. Ed. 265, 276, 16 Sup. Ct. 1173. In the present case the record discloses this mode of management of both the Southern Pacific Company and the Union Pacific Company, and, since 1905, as the proof shows, a majority of both executive committees consisted of the same persons, and Mr. Harriman was chairman of both committees.

It is contended for the appellees, however, that, in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue the control of the Union Pacific Company over the Southern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind the object of the statute to end such combinations and the duty of the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable,

but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law. So of the privilege of sale to the stockholders in proportion to the amount of their holdings. * * *

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity, dealing with such combinations, should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed, and no form of dissolution be permitted that, in substance or effect, amounts to restoring the combination which it was the purpose of the decree to terminate. * * *

So ordered.

Mr. Justice VAN DEVANTER took no part in the hearing or determination of this motion.

ALUMINUM CO. OF AMERICA v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals of the United States, 1922. 284 Fed. 401.)

WOOLLEY, Circuit Judge. This is a petition of Aluminum Company of America for review of an order of the Federal Trade Commission commanding that corporation, on a finding that it had violated section 7 of the Clayton Act, 38 Stat. 730 (Comp. St. § 8835g), to divest itself of all its stockholdings in the Aluminum Rolling Mills Company, another corporation.

The relevant facts, shortly stated, are these:

The Aluminum Company of America (to which we shall refer as the Aluminum Company) is the dominant factor in the aluminum industry. Its business, and that of its subsidiaries, extends to the production and sale of crude or pig aluminum and of aluminum ingots; the production and sale of sheet aluminum rolled from ingots; and the manufacture and sale of articles, fabricated from sheets.

During the time covered by this controversy the Aluminum Company produced one-half of the pig aluminum and aluminum ingots made in the world and all that was made in the United States. Its ingot output was 150,000,000 pounds a year. In the domestic field, one substantial competitor—the Southern Aluminum Company, of

French affiliation, with a capital of \$8,000,000—arose before the war; but during the war it succumbed to financial difficulties and its properties were purchased by the Aluminum Company.

Pig aluminum and aluminum ingots are used for two general purposes, namely; for casting articles and for rolling sheets. From aluminum sheets many things are made, among them kitchen utensils and automobile bodies. The Aluminum Company and its subsidiaries produce one-half of all the sheet aluminum made in the world and, prior to the war, they produced all of the sheet aluminum made in the United States.

In March, 1915, the Cleveland Metal Products Company—of which we shall have more to say presently—built a mill for rolling sheet aluminum of a width of 60 inches and entered the trade in competition with the Aluminum Company and its subsidiaries.

In 1916, the Bremer-Waltz Corporation became a competitor of the Aluminum Company and its subsidiaries in the manufacture of sheet aluminum 30 inches wide. In 1919 this concern sold a part of its physical assets including its rolling mill to the Aluminum Goods Manufacturing Company of whose stock the Aluminum Company owns 36 per cent.

In 1916, the United States Smelting & Aluminum Company became a competitor of the Aluminum Company and its subsidiaries in sheet aluminum of the width of 30 inches.

Thus during the time in question the Aluminum Company had no domestic competitors in the manufacture of aluminum ingots and but three competitors in the manufacture of aluminum sheets, two of narrow sheets and one of broad sheets; the difference in width of sheets being a factor in the breadth of the sheet market; for only broad sheets are used in the manufacture of automobile bodies.

Prior to 1913, there were two corporations doing business in the City of Cleveland, the Cleveland Metal Products Company and the Cleveland Foundry Company, which were owned by the same people. The Cleveland Metal Products Company (hereafter referred to as the Cleveland Company) was engaged in the manufacture of enameled steel cooking utensils, and the Cleveland Foundry Company (hereafter dropping out of the case) was engaged in the manufacture of oil stoves with aluminum parts. These corporations were merged in January, 1917, under the name of the former.

In 1913 the Cleveland Company contemplated the extension of its steel cooking utensils business by adding aluminum cooking utensils. With this in view it took up the matter of rolling its own sheet aluminum from which to fabricate its cooking utensils and stove parts. Its first step was to investigate the sources of raw material. It knew that aluminum ingots could be purchased from the Aluminum Company, the sole domestic source. Its president, however, went abroad and found that aluminum ingots could be purchased in Europe. Being as-

sured of an ingot supply from the foreign source, the president returned to America and, on his report, the Cleveland Company began the erection of a plant. This plant was completed in 1915 at a cost of \$227,000. In order to roll sheets for its own use at a low cost, the mill was constructed on a scale larger than the company's own needs. Its capacity was 250,000 pounds of sheet aluminum a month, of which later the company used 27 per cent. in the manufacture of its products and sold 73 per cent. on the market. Recourse to the foreign market having been cut off by the war, the Cleveland Company obtained ingots from the Aluminum Company, the only available source. From sheets sold on the market (not from sheets used in its own business), the Cleveland Company earned net profits of \$23,000 for the six months ending December 31, 1915; \$219,000 for the year 1916; and \$52,000 for the year 1917. Profits in these substantial amounts were due, it is explained, to several causes: One was that the demand for sheet aluminum arising from the war exceeded the supply; another, that the market price for sheets was fixed by extensive time contracts of the Aluminum Company at a point considerably below what the trade was willing to pay for spot deliveries, and that the Cleveland Company, declining to make time contracts, was able to sell its product at the higher figures.

When the United States entered the war and was about to fix the price of sheet aluminum (which it did in March, 1918) prices of the upper level began to recede toward those of the lower level and the Cleveland Company found that the "spread" or difference between the cost price of ingots, fixed by the Aluminum Company, and the selling price of sheets, likely to be fixed by the Government, was not sufficient to cover the cost of converting ingots into sheets. Therefore, with a market responding to this situation, the Cleveland Company incurred losses of \$14,000 a month for the first two months of 1918, with a prospect of continuance. This condition of actual and impending losses was made more acute by the fact that the Cleveland Company had outstanding a contract with the Aluminum Company for the purchase of ingots running into the future. The Cleveland Company asked the Aluminum Company to relieve it from its contract. The Aluminum Company declined. There followed interviews, discussions, negotiations between the officers of the two companies and, eventually, the development of a plan to meet the difficulty. This plan contemplated the organization of a new corporation to be known as "Aluminum Rolling Mills Company" and its capitalization at \$1,000,000, of which \$600,000 was to be issued; the sale by the Cleveland Company of its rolling mill and sheet business to the new corporation at a figure somewhat above the cost of the mill; subscription by the Cleveland Company for \$200,000 and by the Aluminum Company for \$400,000 of the capital stock of the new corporation; and the organization of the new corporation and the

operation of the mill by the Aluminum Company. This plan was carried out with an assurance to the Cleveland Company that its needs for sheet aluminum would be cared for at market prices. This is the transaction which the Federal Trade Commission found to be violative of section 7 of the Clayton Act.

The findings of the Commission were based solely on section 7 of the Clayton Act (hereafter referred to as "the section"). Hence, this is the only law involved in the case.⁵¹

The Aluminum Company, maintaining under recent decisions that it is for the courts, not for the Commission, ultimately to determine, as matter of law, what acts "lessen competition," "restrain commerce," or "tend to create a monopoly" within the meaning of the section, *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993; *Curtis Publishing Co. v. Federal Trade Commission* (C. C. A.) 270 Fed. 881; *Standard Oil Co. v. Federal Trade Commission* (C. C. A.) 273 Fed. 478, 17 A. L. R. 389, challenges the Commission's order on several grounds. All are based on the proposition of law, arising from the power of the Congress to enact laws controlling interstate commerce, that before there can be a violation of the section both the corporation acquiring stock and the corporation whose stock is acquired must at the time be engaged in interstate commerce.

Taking up the events in the order of their occurrence, the Aluminum Company's first contention is that this requirement of the section is not met by the phase of the transaction relating to the Cleveland Company because, although that corporation was engaged in interstate commerce, it was not the stock of that corporation which the Aluminum Company acquired. While this is literally true we cannot thus summarily drop the Cleveland Company out of the case. The Cleveland Company was one of two actors in the transaction whose effect on trade the Commission found violated the section. Therefore, we must inquire, as did the Aluminum Company in its briefs, into the effect of the transaction on commerce, not with reference to lessening of competition alone but with reference as well to its tendency to create monopoly.

Clearly, the object to which the section is directed is not the mere acquisition of stock of one corporation by another. It is the "effect" of such acquisition upon commerce. Our first inquiry, therefore, is whether in this case the effect was substantially to lessen competition between the two corporations. The Aluminum Company meets the issue of lessened competition as it bears on the two phases of the transaction, one between itself and the Cleveland Company and the other between itself and the Rolling Mills Company.

As between itself and the Cleveland Company, the Aluminum Company contends there never was competition during the three years the latter concern was rolling and selling sheets, because, it maintains,

⁵¹ Section 7 is here quoted.

under the exceptional conditions arising from war, there was always a sellers' market, that is, a market, where, as we understand it, sellers do not have to compete for trade but where the trade competes for sellers' products. It is hard to believe that the Congress intended that violations of Section 7 of the Clayton Act should be determined according to market movements and that the section may be violated when stock acquisition is made on a 'buyers' market and not violated when a like acquisition is made on a sellers' market. We are of opinion that the finding of the Commission that there was competition between the Aluminum Company and the Cleveland Company during the period in controversy is supported by the testimony.

The next question is whether the testimony shows that this competition was substantially lessened by the stock acquisition which followed. As the transaction eliminated the Cleveland Company from the sheet trade, manifestly it put an end to competition between that corporation and the Aluminum Company and its subsidiaries. The "effect" of a transaction which ended competition between the Aluminum Company and its one competitor in the manufacture and sale of wide sheets and ended competition between it and one of only two independent competitors in the manufacture of sheets of any width, was inevitably to lessen competition, and to lessen it substantially. Still, the Aluminum Company says, the law was not violated because the substantial lessening of competition was not between the corporation whose stock was acquired and the corporation which acquired the stock. This also is true; but, as every one agrees, the transaction had two parts; one between the Aluminum Company and the Cleveland Company by which competition between them was ended; the other between the Aluminum Company and the Rolling Mills Company. Violation of the section does not turn alone on a substantial lessening of competition. It turns, in the disjunctive, on the tendency of the transaction "to create a monopoly." For these reasons we are of opinion that the lessening of competition with the Cleveland Company has an evidential bearing on the next question, whether the acquisition of the stock of the Rolling Mills Company by the Aluminum Company tended to create a monopoly. Obviously, while the ending of competition with the Cleveland Company and the acquisition of the stock of the Rolling Mills Company were parts of one transaction, these parts were interdependent and were so intimately related that one cannot be considered without the other.

Passing from the phase of the transaction with the Cleveland Company, which, though engaged in commerce, was not the corporation whose stock was acquired, and coming to the phase where a new corporation was created whose stock, it is contended, was acquired before it began rolling sheets and delivering them in commerce, the Aluminum Company advances the proposition that the latter phase of the transaction does not come within its interpretation of the section that

before the law can be violated both the corporation acquiring stock and the corporation whose stock is acquired must at the time be engaged in interstate commerce. In other words, the Aluminum Company maintains that the new corporation at the time its stock was acquired had not begun business and, therefore, could not have been "engaged * * * in commerce." From this premise the Aluminum Company draws the conclusion that the latter phase of the transaction did not violate the section. Continuing argumentatively, it maintains that after the stock acquisition and when later the new corporation embarked in commerce, it created commerce where none before existed, the effect of which was to increase, not to restrain, commerce; and, as there was no competition between the Aluminum Company and the new corporation at the time of the acquisition of its stock, necessarily "the effect of such acquisition" could not be to lessen competition where none existed. It seems to us that in this defense the Aluminum Company stands on a ledge too narrow for safety. Assuming for a moment that at the time of the stock acquisition the new corporation had not become engaged in commerce because it had not begun rolling sheets and, therefore, had not been in competition with the Aluminum Company, we doubt that the Aluminum Company could be saved from violating the section in view of the next fact that by the terms of the arrangement the Aluminum Company at once put the new corporation into commerce, and put it into commerce in a way which forever prevented competition with itself.

But the lessening of competition is not the only effect of the acquisition by one corporation of stock of another which the Congress sought to avoid. It intended as well to prevent a transaction "where the effect" may "tend to create a monopoly," which is the effect which the Commission found in the acquisition of the stock of the Rolling Mills Company. A monopoly can be created by a transaction of stock acquisition when the effect is not to lessen competition with the corporation whose stock is acquired if the effect is to end competition existing elsewhere, *United States v. New England Fish Exchange* (D. C.) 258 Fed. 732, 746; as for instance the ending of competition with the Cleveland Company. This is for the reason that the lessening of competition and a tendency to monopoly are not always synonymous. There may be a lessening of competition between two corporations in a stock transaction that does not tend to monopoly. But, curtailing this discussion, we are not prepared to admit the premise from which the Aluminum Company deduces its conclusion. In other words, we do not find that at the time the Aluminum Company acquired the stock of the Rolling Mills Company the latter was not engaged in commerce and was not, potentially, engaged in competition with the Aluminum Company, for these reasons:

Prior to February 17, 1918, the Cleveland Company had been engaged in competition with the Aluminum Company. On that day it

agreed with the Aluminum Company to organize, and later there was organized, a third corporation, which was to purchase, and later did purchase, the aluminum rolling mill and also the "aluminum rolling mill business" of the Cleveland Company. This finding of the Commission is sustained by the record which includes an agreement between the two old corporations for sale by the Cleveland Company to the new corporation not of its rolling mill alone but its accounts receivable, and providing also for the delivery to the new corporation of a list of the Cleveland Company's customers scattered through many states, and for the taking over by the new corporation of all "unfilled orders" for aluminum sheets on the books of the Cleveland Company. The "business" thus sold by the Cleveland Company and purchased by the new corporation was that of a going concern consisting of the manufacture and sale of sheet aluminum in commerce and in competition with the Aluminum Company. Settlement with the Cleveland Company for the purchase of these assets was not made at the time with money acquired by the new corporation from previous sale of its stock, but was made by six notes given by the new corporation payable monthly, and the notes were met from the proceeds of six monthly calls upon the Cleveland Company and the Aluminum Company to meet their stock subscriptions. During the period through which these payments were being made and stock subscriptions were being paid, the new corporation had begun the operation of the newly acquired plant and continued its operation until the mill was moved to a new location. Later, during the change from the old mill to the new, doubtless the rolling of sheets was suspended. Yet it does not follow that the relation of the new corporation to the trade which it had purchased and in which it had been engaged was also suspended, and that, in consequence, the new corporation was not engaged in commerce within the meaning of the section. Having purchased trade upon which to start, and having started upon the trade it had purchased, the new corporation was, we think, truly engaged in commerce at the time of the stock acquisition.

In addition to the several defenses made by the Aluminum Company there is much in the record to the effect that the need of aluminum for purposes of war and the assistance rendered the allied governments and our own government by increasing production and maintaining reasonable prices entered into the transaction. For these reasons and others it is persuasively urged that the arrangement was not a device intended to get around the Clayton Act but was a plain business transaction having the twofold object of relieving one party from a difficult business situation and enabling the other party to meet more effectively the demands of war. With these matters, we surmise, we have no present concern. They have to do with the motive for the transaction. We have to do only with the "effect" of the transaction; and with its effect only as it may "substantially lessen competition * * * or restrain commerce, * * * or tend to create a mo-

nopoly." As we are not called upon to determine whether the Aluminum Company is a monopoly within the definition of the Anti-Trust Law (Comp. St. § 8820 et seq.), we limit our decision to the question whether, within the policy of the Clayton Act, the transaction comes within the definition of the section. In this we are of opinion that it does, and that its effect upon actual competition as well as in destroying potential competition in a way later to make actual competition impossible was substantially to lessen competition between the corporation whose stock was acquired and the corporation making the acquisition; and second, that without regard to whether its effect was substantially to lessen competition between these two corporations, the stock acquisition did, in effect, "tend to create a monopoly."

Being of opinion that the findings of the Federal Trade Commission are supported by the testimony, its order is sustained.⁵²

RICHARDSON v. BUHL.

(Supreme Court of Michigan, 1889. 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.)

See ante, p. 227, for a report of the case.

MONONGAHELA RIVER CONSOL. COAL & COKE CO.
v. JUTTE.

(Supreme Court of Pennsylvania, 1904. 210 Pa. 288, 59 Atl. 1088, 105 Am. St. Rep. 812, 2 Ann. Cas. 951.)

Bill by the Monongahela River Consolidated Coal & Coke Company against William C. Jutte. Decree for plaintiff, and defendant appeals.

Bill in equity for an account. The following is the opinion of the court below:

"The bill is for an injunction to restrain the defendant from carrying on the business of mining and shipping coal in the territory traversed by the Monongahela, Ohio, and Mississippi rivers and their tributaries, contrary to his agreement not to do so, made with the plaintiff company, on his sale of his mining and shipping business and the good will thereof to the plaintiff company."⁵³

DEAN, J. In the year 1895 Finley and Whitney commenced taking options in writing from owners and operators of coal properties on or adjacent to the Monongahela river. The river was navigable for coal shipping about 80 miles southwest from its junction with the Allegheny river at Pittsburg, and for the greater part of this distance is in Pennsylvania. At the time the options were being taken a large num-

⁵² The dissenting opinion of Buffington, Circuit Judge, is omitted.

⁵³ The findings of fact and remainder of the lower court's opinion is here omitted.

ber of persons, partnerships, and companies were engaged in the business of mining and shipping coal down the river from the Monongahela territory to points on the Monongahela, Ohio, and Mississippi rivers as far south as New Orleans, reaching points in all the states through which the rivers flowed. The object of the promoters was to take options from all the coal operators on the Monongahela from whom they could buy at a price to be agreed upon. Out of the whole number of operators they agreed with and took an optional purchase from many of them; among these last this defendant and his partners in the coal business. The purchase from defendant and his partners included all the property of the latter then operated by them on the Monongahela river, coal mines, coalboats, towboats, steamers, shipping and landing wharves from Pittsburg to New Orleans. Finley and Whitney also took like options from all the coal operators with whom they could agree, and who were engaged in a like business to Jutte and his partners.

It was not a conspiracy or combination between all of the selling companies, who, along with defendant, gave options on their properties to plaintiff to purchase, and then contracted not to enter into competition with plaintiff on that river for a fixed period, for, so far as appears, each vendor contracted for himself alone, without reference to any other; but as concerned results the consequences to interstate commerce were the same as if all the vendors had joined in one contract with plaintiff. To that extent traffic was stopped on their part the same as if a direct combination among them all had been made. A large number of mines, going operations on the Monongahela, they did not buy or obtain options for. There was also a large number of steamboats and other transportation property on which options were not taken. On October 2, 1899, in pursuance of the optional agreements with defendant and his partners, for the consideration of over \$1,000,000, which was paid, all the property was transferred to plaintiff. The other operators who had given options but had no connection with the defendant, about the same time transferred their properties to plaintiff. The plaintiff company was at the time of the transfer and still is, a Pennsylvania corporation. Within 15 months after this transfer by Jutte, and after he had received the consideration money, he joined with others, and obtained from the state of New Jersey, a charter for a coal company, purchased and opened large tracts of coal land upon the Monongahela, also boats for transportation, and is now actively engaged in the business of mining and transporting coal upon the Monongahela, Ohio, and Mississippi.

There is no dispute as to the main facts. So far as a man can bind himself by a written stipulation not to do a particular thing, the defendant, after receiving the full consideration for his promise, is openly and defiantly violating it. He justifies this violation on two grounds: (1) The contract with the others entered into between him and plaintiff constituted a monopoly, and is therefore void, because against

public policy. (2) The contract is in violation of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], commonly known as the "Anti-Trust" or "Sherman" Act, and is therefore void.

Each of the transfers directly to the plaintiff company embodies this stipulation: "We severally and jointly stipulate, covenant and agree to and with the said the Monongahela River Consolidated Coal and Coke Company, not to engage directly or indirectly, individually or through partnership or partnerships, limited partnerships, corporations (except in conjunction with the said the Monongahela River Consolidated Coal and Coke Company) in the business of mining, marketing or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers, and their tributaries for the period of ten (10) years from the date hereof." It may be argued, as is argued here, that it was the intention of these contracting parties to create a monopoly in the plaintiff of the coal mining business adjacent to the Monongahela river, but that is an inference from the circumstances dehors the agreement. So far as appears from the face of the agreement, except as to the restriction of defendant to time and place, it was simply a purchase at full price by one coal producer of another's plant. To monopolize, according to the Century Dictionary, is "to obtain or engross the whole of; obtain exclusive possession of." Assume that the plaintiff bought, in addition to defendant's plant, 49 others, and that it had a capital of \$40,000,000 in stock and bonds. Then, at the rate it paid for this property, it could not have been far from the end of its resources. The evidence shows without contradiction that there were 18 mines in operation which the plaintiff did not buy. Besides there were many thousands of acres of workable coal land accessible to the river which could have been bought had it desired to obtain or engross the whole. The defendant himself within a few months bought other coal lands and opened mines on the Monongahela. He has also purchased and built boats and acquired all the means of transportation to successfully compete with plaintiff company.

Whatever may have been the undisclosed intention of plaintiff at the date of its purchase, neither the agreement it made with defendant nor those it made with his co-vendors, nor any of the surrounding facts at the date of the agreement, unless it be the restriction before quoted, show any intention to obtain exclusive possession of either all coal or means of transportation in the Monongahela valley. That stipulation does undoubtedly exclude the defendant and all others signing similar agreements from mining coal on the Monongahela, or shipping on that river, the Ohio and Mississippi, or their tributaries; and to that extent the stipulation constitutes a monopoly—that is, a monopoly in so far as it debars those particular individuals for a specified term of years from engaging in that particular business on certain rivers. Is that stipulation void because contrary to public policy? As we understand the public policy of this commonwealth, both as

disclosed in the Constitution of 1874 and as apparent in all the legislation since, it is to encourage and promote large aggregations of corporate capital for the development of all the commonwealth's resources.

The last case in this state distinctly following the older rulings is *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159. That case held to the principle that all restraints on trade are injurious to the public, and therefore presumably illegal and void on the ground of public policy. In that case five coal companies had entered into an agreement to mine coal, and then practically pool the product, each, through a committee, to equalize their respective shares in the fund according to the award of the committee, which committee was to determine and control the output of the mines so as not to lower the market price of coal. A draft drawn by one of the coal companies on the other to equalize the division between them, after acceptance, was protested for nonpayment. Suit was brought, and the defense was made that, being based on the pooling agreement, that agreement was in restraint of trade, and was void, because against public policy. This court so decided, and the plaintiff was not permitted to recover. That case was decided in 1871.

While we have no doubt as to the soundness of the general principle laid down in that case, we doubt if to-day the court would hold, on the particular facts developed, that the principle was applicable to those facts. We think that perhaps at this day we would go further, and inquire whether, in view of the purpose of the contract, and the slight restraint it imposed on trade, it was unreasonable, and therefore void, and not void solely because it to a certain extent monopolized the production of coal. For in a certain sense every coal corporation with a large capital engrosses the business to the exclusion of individuals of small means. It is able to buy and develop a large acreage, and open upon it many coal mines; then to supply itself at a heavy outlay with all the means of transportation to market. It buys up the stock of smaller corporations and the property of individuals, and consolidates them in some form into one company under one management. Probably, at this day, if the five companies in the case cited desired to stop competition among themselves, and cheapen production by cheapening the cost of management, they would, under our corporation act of 1874, and its supplements, adopt some scheme of consolidation under one charter, and thus to a greater extent, and far more effectually, suppress competition than they did under their pooling agreement, which was declared illegal because against public policy. The professed purpose in organizing these large corporations is, not to kill competition, but to cheapen production in the interest of the public. Yet, whatever the real purpose, competition is stopped by an entirely lawful method. Prior to the adoption of our present Constitution, to obtain authority to organize a coal corporation it was necessary in each instance to resort to the Legislature for a special act.

Compared with the number now in existence of such corporations, but few were organized. But the present Constitution prohibited all such special acts, and declared, in effect, that in the future all such corporations should be organized under the general laws to be adopted by the Legislature. The Legislature enacted the general corporation act of 1874, a most liberal act in its requirements. Very soon a host of coal corporations sprang into existence, which, with their large capital, bought out, or by their cheaper production drove out, individual producers, so that to-day there is but little competition in the business with individuals.

We have only to peruse our own Constitution and the statutes adopted in pursuance of its mandate to learn what has been the public policy in this regard in the commonwealth. If competition has been largely suppressed, if the courts more liberally interpret in their application the common-law rules on the subject of monopoly, it is only because a more rigorous interpretation would defeat the true intent and meaning of our constitutional and statutory legislation on the subject. Our decisions on this subject may not be in accord with those in some other states, and possibly not in accord with those in the federal courts, but in so far as they affect matters only within the territorial jurisdiction of this commonwealth, and do not conflict with the Constitution of the United States or statutes adopted in pursuance thereof, we believe they are sound, because in accord with the public policy of this state, and we shall adhere to them.

The opinion in the case cited is a very able one by the late Chief Justice Agnew, in which most of the English authorities and those of our own states up to that day (1871) are noticed. But since then both in England and this country the doctrine has been much relaxed as to all such contracts. A full review of the cases is found in *Carter v. Alling* (C. C.) 43 Fed. 208, decided in 1890. In that case *Blodgett, J.*, says: "The only defense seriously insisted upon in the case is that this contract is void as a contract in restraint of trade. * * * In the earlier English doctrine upon the subject of contracts it was held that they were contrary to public policy, and void; but, as the later cases came before the court, this doctrine was much relaxed, and the first modification of the doctrine was the recognition of the validity of contracts of this nature where the restraint was limited as to space or time and reasonable in its nature. And the reported cases are abundant in which an undertaking by one person not to carry on a given business within a limited area and within a fixed period of time has been sustained. * * * In later years a further relaxation of the old rule has grown up in England and America, and the courts have repeatedly recognized the validity of contracts in the restraint of trade throughout the entire country, where such restraint was not unreasonable in view of the nature and extent of the business of the covenantor." This is the general current of decision in this day. When a contract is presented which in some degree restrains trade, we do not at once decide that

it is void as against public policy, but we go further, and inquire, is it limited as to space or time, and is it reasonable in its nature? We are approaching nearer and nearer to the conclusion, although we have not yet reached it, that common honesty is the true public policy.

This contract is limited as to time, ten years; it is limited as to space, the immediate territory adjacent to three navigable rivers and their tributaries. This is its plain interpretation, although these words are not used. The boats purchased could reach no further than the landings and wharves thereon. Then is the restriction reasonable? The time was not an indefinite period, as in some of the cases. Shipments could be made, owing to the uncertainty of navigation, but once or twice a year. The time and space covered by the restriction were each, considering the character and extent of the business, reasonable. The defendant also sold his good will in the business. Considering the facts, and that a full price was paid, even though the agreement restrained defendant, we think the restraint reasonable, and therefore the contract was not a violation of the public policy of this state, and hence, as concerns that point it ought to be enforced in equity.⁵⁴

EXPORT LUMBER CO. v. SOUTH BROOKLYN SAW-
MILL CO.

(Supreme Court of New York, 1900. 54 App. Div. 518, 67 N. Y. Supp. 626.)

Action by the Export Lumber Company against the South Brooklyn Sawmill Company and others. From a judgment in favor of plaintiff, defendants appeal.

The following is the opinion of the court below (Nash, J.):

Two of the five defendants demur to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The point made by defendants' counsel, as stated in his brief, is as follows: "This agreement was evidently a thinly-disguised attempt to create an absolute monopoly in the business of exporting lumber, destroying competition, and prejudicing the public interests in the most flagrant way, since it permitted each party to the corrupt agreement to masquerade before the public as an independent business concern, quoting prices to dealers under the misleading guise of firms competing in the same business, when by secret agreement all the results of the sale were to be turned into the Export Company, the plaintiff, and to be distributed to the different parties to the agreement upon a fixed ratio or percentage. Such an agreement is against public policy, and will not be upheld." An agreement will not be adjudged to be illegal when it is capable of a construction

⁵⁴ In the remainder of the case it was held that such contract was a violation of the Sherman Act, but, being divisible, the seller might be enjoined from engaging in the business in question within the state for ten years.

which will uphold and make it valid. *Lorillard v. Clyde*, 86 N. Y. 384; *Cohen v. Envelope Co.*, 9 App. Div. 425, 41 N. Y. Supp. 345. The contract between the parties to this action, if carried out and performed in accordance with the purpose and terms stated in it, is, upon its face, innocent enough, and perfectly consistent with fair business dealing. Briefly, it is a contract between six parties, two co-partnerships and three corporations and an individual, dealers in lumber in New York and Brooklyn, by means of which they propose to transact the part of their business which consisted of the export trade together, and divide profits and loss in certain agreed proportions. The contract recites that the parties to the agreement are some of the persons and corporations engaged in the business of selling lumber for export from the port of New York to foreign countries, each of the parties being engaged in other lumber business than the export trade; that they had been investing large sums of money in unnecessary duplications of stocks, and, desiring to otherwise economize in the expenses of conducting that part of their business, agreed to sell to one of their number their several and respective stocks of lumber purchased of or held by them respectively for the export trade, and lease their respective lumber yards, or portions thereof, to the party purchasing, the plaintiff herein; the plaintiff and each of the defendants to continue the transaction of his or its export business as before, without being required to disclose the agency of either defendant in the transaction of the business; each and all of the parties to account together, and divide profits and losses in the business. The business, it was provided, should be done under the direction and supervision of an advisory committee composed of members appointed by the parties. None of the parties were to conduct business in the export trade from the port of New York, except under the provisions of the agreement.

The principle of law which the defendants invoke, and to which it is urged the agreement here is obnoxious, is stated and applied in the case of *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790, cited as applicable to the case at bar. The real nature and purpose of the agreement there being to suppress competition in an article of food, and so tending to enhance prices, it was held void, as contrary to public policy.⁵⁵ The parties to the two contracts, which it was considered should be read together as one, were the New York & New Jersey Sheep Brokers' Association and the Sheep & Lamb Butchers' Benefit Association of the City of New York. The agreement which the plaintiff was endeavoring to enforce provides for the admission to the association of new members, and the extension of its privileges to all who might join. The contracts between these two organizations, read together and thus considered, were manifestly intended to create a combination between the butchers en-

⁵⁵ A part of the review of this case is omitted.

gaged in buying and the brokers engaged in selling sheep and lambs to control the market, fix the price, and destroy competition; and thereby the public, who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement.

In *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, cited in support of the defendants' contention, there was a combination of dealers in the city of Lockport by an organization agreement to prevent competition as between those who were interested in the sale of coal, entered into by all of the retail coal dealers in the city except one, of which it was said in the opinion, "The organization was a carefully devised scheme to prevent competition in the price of coal among retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport, except in conformity with the rules of the exchange." In the case at bar it does not appear that any of the parties were producers of lumber, or that they in any manner controlled the supply of lumber in that market for export or other purposes. They were traders, simply engaged in selling lumber, and by their contract agreed to transact their business in a particular manner, which, in the absence of evidence as to the proportion of the trade which they held or controlled, it cannot be determined would enable them to fix the price of lumber for export, or might result injuriously to or in any manner affect the public. Secrecy as to the manner of transacting the business could have no effect on the market price of lumber.

Demurrer overruled, with costs, with leave to the defendants to answer within twenty days on payment of costs.

Argued before VAN BRUNT, P. J., and HATCH, RUMSEY, PATTERSON, and INGRAHAM, JJ.

PER CURIAM. Judgment affirmed, with costs, on the opinion of the court below, with leave to defendant to withdraw demurrer and answer on payment of costs in this court and in the court below.

AMERICAN PRESS ASS'N v. UNITED STATES.

(Circuit Court of Appeals of the United States, 1917. 245 Fed. 91, 157 C. C. A. 387, L. R. A. 1918A, 1089.)

Before BAKER and ALSCHULER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge. On August 3, 1912, the United States began a suit against the American Press Association, a corporation, the Western Newspaper Union, a corporation, and others, engaged in furnishing country newspapers with stereotype plates and ready-print service, to enjoin the continuance of acts alleged to be in violation of the Sherman Anti-Trust Law. A consent decree was entered

the same day. Among other prohibitions, the Western Newspaper Union was permanently enjoined:

"(a) From combining or attempting to combine with the American Press Association, either by purchase, stock ownership, or in any other manner; * * * (c) from selling any of its product or services at less than a fair and reasonable profit, or at cost, or less than cost, with the purpose or intent of injuring or destroying the interstate trade and commerce of the American Press Association or of any other competitors."

On May 9, 1917, the American Press Association filed a petition in the original suit, setting forth changes in condition, on account of which it prayed for a modification of provision (a). To this petition all the parties appeared, evidence was heard, and the court found: "That the facts set forth in the petition and the evidence introduced to support the same are immaterial; that it is contrary to the whole spirit and purpose of the Sherman Law to authorize one competitor to absorb another competitor, regardless of whether such competitor is able to continue in business or not; and that the sale of such assets and business by the American Press Association to the Western Newspaper Union would be in violation of the Sherman Law." And thereupon the court decreed that the petition be denied. Cause No. 2509 is an appeal from that decree.⁵⁶ * * *

Facts pleaded and proved, so far as necessary for a decision, are briefly these: In 1912 the American Press Association had about 5 per cent. of the ready-print business. But it did not furnish advertisements to the country newspapers with its ready-print service, whereas the Western Newspaper Union did. The result, down to January, 1917, was that the Western Newspaper Union could and did supply ready-print at lower rates than the American Press Association could stand without loss; and the ready-print business of the latter has fallen to less than 1 per cent. In 1912 the American Press Association had a large part of the stereotype plate business. But its plate business had to bear substantially all the overhead expenses, while the Western Newspaper Union's ready-print service could carry the overhead and leave its plate business as a profitable by-product. In January, 1917, the Western Newspaper Union reduced its price on miscellaneous plate matter by one-fourth and on serials by one-third. On the American Press Association's complaint that provision (c) of the injunction was being violated, the Department of Justice investigated and correctly found that there was no violation.

Since the outbreak of the World War there has been an increasing scarcity of print paper, and mounting prices. Few new country newspapers are being started; many have reduced their sizes; quite a number have quit. This condition brought the American Press Association's plate business to a loss of over \$3,000 a month, which

⁵⁶ Parts of the case, relating to another cause, are omitted

is progressively increasing, and has also made it impossible for that company to build a ready-print business to help bear the overhead. The directors have decided to wind up the plate business as speedily as possible, whatever may be the outcome of this proceeding. They are continuing it at a loss while the question is being determined whether they must dispose of their plate plant as junk, or whether they may sell it as a going concern to the Western Newspaper Union, for the latter is the only probable bidder. No one now outside the business would be likely to buy a demonstrated loss. But to the Western Newspaper Union the plant may have more than junk value. If the plant is broken up, the newspapers now being served thereby may have to go to the Western Newspaper Union as the only concern left in the business; and it might be more economical for that company to buy an existing plant than to enlarge its own or build a new one. At the same time it is evident that, if the plant is disintegrated, the newspapers now looking to it would suffer inconvenience and loss while arranging to obtain other service.

What is the application of the Sherman Law to these facts? Not every joinder of competing businesses or acquisition of instrumentalities that have been used in competition is an undue restraint of trade or a creation of a monopoly. Each situation must be measured by the rule of reason. And a fundamental test is injury to the public. If it were not for provision (a) of the decree, and the law back of it, these two companies might get together and fix a price that would provide a reasonable profit to the American company and an unreasonable one to the Western. For the newspapers, and through them the public, to pay for the profitable operation of an inefficient concern is an injury. And a combination to that end would be an unreasonable restraint of trade. That course cannot be pursued. And, because it cannot, the American company is forced to go out of the plate business. No decree can stop that. And after the American company quits, if the Western is left alone in the field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer. Neither the decree nor, in our judgment, the Sherman Law, prevents the Western from buying the scraps piecemeal. If it did buy, it could organize them anew. If it be permitted to buy the integer, it would save the expense of reorganization. If the plant be scrapped, two injuries result: One to the public from the destruction of a usable and useful plant; the other to the stockholders of the American company.

As to the first, a law designed to shield the public from injury should not be construed to compel the public to suffer an injury. As to the second, the Sherman Law, in our opinion, does not require the stockholders of a company, even a company that was a self-confessed wrongdoer in 1912, to sustain a loss in 1917 arising without wrongdoing, if that loss can be prevented without injury to the public. In-

jury can be prevented, we believe, by attaching to the permission to buy the plant as a going concern a condition which should be read in the light of provision (c) of the injunction. Within common knowledge one of the evils at which the Sherman Law was aimed was the acts of monopolizers in killing competitors, by selling at less than cost of production and then mulcting the public for the expense of the campaign with undue profits added. For practices of that kind during and prior to 1912 the Western Newspaper Union was put under the continuing prohibition of provision (c). Since 1912 it has not charged less than cost plus a fair and reasonable profit. On the other hand, the record, at least inferentially, demonstrates that it has not exacted more than cost plus a fair and reasonable profit. If it continues in the same even tenor of fairness, if it refrains from putting up prices that would incite outside capital to unneeded offers of like service and then killing competition by underselling at a loss, to be recouped by fixing unwarranted prices again, we perceive no reason why it should not be permitted to buy the plant as a going concern.

In No. 2509 the decree denying the petition is reversed, with direction to enter a decree, supplemental to the original decree, authorizing the Western Newspaper Union to be a bidder and purchaser at a sale by the American Press Association of its plate plant and business as a going concern, on the condition and under the prohibition that the Western Newspaper Union shall not employ the plant and business so purchased, or use the situation created by such purchase, to charge more for its plate service to newspaper publishers than cost of production plus a fair and reasonable profit, such fair and reasonable profit to be measured relatively by the range of annual profit obtained by the Western Newspaper Union from its plate business since the entry of the original decree of August 3, 1912, without, however, depriving the purchaser of such profits as result from its purchase by reason of the increase of business and the economies in the cost of production following the same; provided that present prices for plate service to newspaper publishers shall not be increased, unless, but not longer than, an increase is warranted by increase in cost factors.

GEDDES v. ANACONDA COPPER MINING CO.

(Supreme Court of the United States, 1921. 254 U. S. 590, 41 Sup. Ct. 209, 65 L. Ed. 425.)

Mr. Justice CLARKE delivered the opinion of the court.

With formalities, which are not assailed, a special meeting of the stockholders of the Alice Gold & Silver Mining Company, by resolution, ratified a contract in writing theretofore authorized by the board of directors and executed by the officers of the company for the sale to the Anaconda Copper Mining Company of all the property, of

every kind, of the Alice Company. The officers were authorized and directed to execute such deeds and assignments as should be necessary to complete the sale, and a deed in form conveying all of the Alice property to the Anaconda Company was executed and delivered by them on May 31, 1910. The consideration, 30,000 shares of the capital stock of the Anaconda Company, was paid, and the purchaser took possession of the property.

Almost a year later, on April 15, 1911, at a special meeting of the stockholders of the Alice Company a resolution was adopted, by the vote of more than two-thirds of the issued capital stock, in favor of dissolving the corporation, and the board of directors was authorized to take the court action prescribed by the laws of Utah, under which the company was organized, to accomplish such dissolution. Suit for this purpose was instituted in the appropriate state court.

On November 6, 1911, five months after the resolution in favor of dissolution was adopted, the bill in this case was filed by minority stockholders, praying for a decree, that the deed of May 31, 1910, be declared void, that it be delivered up and canceled, that the consideration for it be returned to the Anaconda Company, and that all court proceedings to dissolve the Alice Company be stayed pending final decree in the case. The District Court approved and confirmed the sale, and its decree was affirmed by the Circuit Court of Appeals. The case is here on appeal.

The appellants claimed in the courts below and argue here that the sale was voidable for four reasons, viz.:

(1) Because the purchase was made in pursuit of the purpose of the Amalgamated Copper Company and the Anaconda Company to monopolize the production of copper in the Butte Camp and to restrain the sale of it in interstate commerce and in the markets of the world, in violation of the Sherman Anti-Trust Act.⁵⁷

With respect to the first contention. It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 (Comp. St. §§ 8820-8823, 8827-8830) for enforcing the rights created by it are exclusive, and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder v. Corn Products Refining Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, 37 Sup. Ct. 718, 61 L. Ed. 1256; *United States v. Babcock*, 250 U. S. 328, 331, 39 Sup. Ct. 464, 63 L. Ed. 1011. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. *Busch v. Jones*, 184 U. S. 598, 599, 22 Sup. Ct. 511, 46 L. Ed. 707; *Clark v. Wooster*, 119 U. S. 322, 326, 7 Sup. Ct. 217, 30 L. Ed. 392.

It is, however, argued that section 16 of the Clayton Act (38 Stat.

⁵⁷ So much of the case as relates to the other three reasons is omitted.

730, 737 [Comp. St. § 8835o]), passed in 1914, was intended to, and does, modify the prior law, as declared by this court, and, since our decision will result in remanding the cause to the lower court, we shall consider its bearing upon the case.⁵⁸

The contention of the appellants is that they will suffer irreparable loss by the sale of the Alice properties to the Anaconda Company, and that the sale should therefore be enjoined because that company and the Amalgamated Copper Company constitute a combination in restraint of interstate commerce within the prohibitions of the Sherman Anti-Trust Act.

The Amalgamated Copper Company, organized in 1899, is a holding company, and in 1911, when this case was commenced, it controlled by capital stock ownership the Anaconda Company which, in turn, held the title to the physical property which had been owned by other corporations, the union of which in this manner in the Amalgamated and Anaconda Companies constituted the alleged unlawful combination in restraint of interstate trade or commerce.

The evidence in the case renders it probable, that the promoters of the Amalgamated Company, when it was organized in 1899, entertained schemes or dreams of controlling the supply and price of copper in the interstate markets of this country and in the markets of the world, and that they did what they could to make that company rich and powerful.

But we are dealing with the Anaconda Company as it was in 1911 and with the extent to which its control of production and of prices appears in the record before us.

There is evidence that the total production of copper in the United States and Alaska in 1899, was 581 million pounds, and of the Anaconda Company 1 million pounds (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there were several mines other than those of defendants, produced 238 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.

Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world.

The evidence with respect to price control, although meager, is more definite. The average price of copper in 1899, the year before the Amalgamated Copper Company was organized, was 17.6 per pound; in 1900 it was 16.1; in 1902, 11.6; in 1904, 12.8; in 1907, 20; in 1908,

⁵⁸ Section 16 of the Clayton Act is here quoted.

13; in 1909, 1298; in 1916, 16; and in 1913, the last year for which the price is given, 15 cents.

It is obviously impossible to say that these fluctuating prices prove monopolistic control of the price of copper by the defendants.

No claim is made that the Anaconda Company restrained or restricted the production of copper, but so far as there is any evidence at all upon the subject it is to the effect that it maintained and perhaps increased the production in the Butte Camp.

Upon the case here made by the evidence it is impossible to conclude that the defendants constituted in 1911 such a combination, within the terms of the Anti-Trust Act, as would justify the granting of an injunction to the plaintiffs even under the provisions of section 16 of the Clayton Act.

The decree of the lower courts as to this first claim must be affirmed.

SANTA CLARA VALLEY MILL & LUMBER CO. v. HAYES.

(Supreme Court of California, 1888. 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.)

Action for breach of contract by the Santa Clara Valley Mill & Lumber Company against Isaac N. Hayes and Thomas B. Hubbard. Finding and judgment for defendants, and plaintiff appealed.

SEARLS, C. J. This is an action to recover \$10,000 for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacture of lumber near Felton, in the county of Santa Cruz, whereby the latter agreed to make and deliver to the former, during the lumber year of 1881, 2,000,000 feet of lumber, at \$11 per thousand feet. Defendants agreed not to manufacture any lumber to be sold, during said period, in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff \$20 per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract; hence this action. The court finds that plaintiff was the owner of three saw-mills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity; that for the purpose of limiting the supply of lumber, and increasing the price thereof, a plan was devised by which plaintiff was to lease all the mills for the year 1881, where such leases could be obtained, and, where that could not be done, to contract with the parties owning mills, and not willing to lease, by contracts similar to the one entered into with defendants; that, during the year 1881, plaintiff should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary, in order to limit the supply of lumber in the four counties hereinbefore named; that this contemplated scheme was carried out, including the contract with defendants as a part thereof; that the sole and only object, purpose, and con-

sideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactured near Felton for the year 1881, and control of the supply of lumber for that year in the counties mentioned; that the direct effect of this was no wholesale market for lumber at Felton, and dealers could not purchase in any considerable quantity during 1881. The court further found that the contract was against public policy, and that plaintiff was not damaged, etc.

1. Was the contract with defendant in contravention of public policy? The general rule is that an illegal contract is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties. A contract tainted with the vice of illegality creates no obligation, not because of the rights of the parties to it, but because the public is interested. In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality the wrong is far-reaching, is done to society. This illegality may be in the consideration or in the promises and stipulations of the agreement. Among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade—contracts between individuals to prevent competition, and keep up the price of articles of utility. *Pom. Const.* § 283; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 346.

The case of *Arnot v. Coal Co.*, 68 N. Y. 559, is in most respects similar to the case at bar. *Arnot*, the plaintiff, brought the suit as the assignee of the *Butler Colliery Company*, which company and defendants were corporations engaged in the business of mining and vending coal at or near Pittston, Pa. Defendant also had a depot for coal at Elmira, N. Y., and was there engaged in vending coal, the product of the Pittston mines, to a large extent of country north and west of Elmira. Defendant entered into a contract with the *Butler Colliery Company* by which said defendant agreed to take all the coal the *Butler Company* desired to send north of the state line, not exceeding 2,000 tons per month, and the *Butler Colliery Coal Company* on its part agreed not to sell coal to any other party, except defendant, to go north of the state line (between New York and Pennsylvania) during the continuance of the agreement. The *Butler Company* sold coal during the term covered by the agreement, to parties other than the defendant; and having delivered to defendant, under the agreement, coal which the latter refused to pay for, the action was brought to recover for the coal so delivered under the agreement. It appeared that defendant had made similar contracts with all the other mining

proprietors of Pittston, and that the object was to so control the shipment and supply of coal for the Elmira market as to maintain an unnaturally high price for coal in that market, and to prevent competition in the sale of coal therein. The court, in considering the appeal, said: "That a combination to effect such a purpose is inimical to the interest of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be a question of this day. [It cites *Coal Co. v. Coal Co.*, 68 Pa. St. 182; *People v. Fisher*, 14 Wend. 9; *Sleeper v. Van Middlesworth*, 4 Denio, 434; *Bank v. King*, 44 N. Y. 87.] Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals; but when he endeavors to artificially enhance prices by suppressing or keeping out of market the produce of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such restraints are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. * * * Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts." And the contract was held void. *Salt Co. v. Guitrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 349; and *Coal Co. v. Coal Co.*, 68 Pa. St. 182, are to the same general effect.

In the case at bar the facts are, as we think, even stronger against the plaintiff than in *Arnot v. Coal Co.* Here it entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing of value, now seeks to recover damages for non-delivery of lumber under this contract. Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit; but when, as a condition of purchase, it bound its vendor not to sell to others under a penalty, it transcended a rule, the adoption of which has been dictated by the experience and wisdom of ages, as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade. With the results naturally flowing from the laws of demand and supply the courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.

2. It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal. If the whole vice of the contract was embodied in the promise of the defendants not to sell

lumber to other persons the illegality would lie in the promise alone, and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration. The very essence and mainspring of the agreement—the illegal object—“was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured,” etc. This being the inducement to the agreement, and the sole object in view, it cannot be separated, and leave any subject-matter capable of enforcement, as was done in *Granger v. Mining Co.*, 59 Cal. 678; *Treadwell v. Davis*, 34 Cal. 601; and *Jackson v. Shawl*, 29 Cal. 267. The case falls within the rule of *Valentine v. Stewart*, 15 Cal. 404; *Prost v. More*, 40 Cal. 348; *More v. Bonnet*, 40 Cal. 251; *Forbes v. McDonald*, 54 Cal. 98; *Arnot v. Coal Co.*, *supra*. The good cannot be separated from the bad, or, rather, the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action.

We fail to see any inconsistency between the eighteenth finding and the first or sixth. The first finding declares that plaintiff and defendants entered into the contract set out in the amended complaint. The sixth finding is to the effect that the contract has not been rescinded, abrogated, or modified. The eighteenth finding is as to the real object and purpose of the contract. The judgment of the court below is affirmed.

UNITED STATES v. PATTEN.

(Supreme Court of the United States, 1913. 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. [N. S.] 325.)

In error to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to certain counts in an indictment, charging violations of the Sherman Anti-Trust Act.

See same case below, 187 Fed. 664.

Mr. Justice VAN DEVANTER delivered the opinion of the court.

This is a criminal prosecution under the Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647, U. S. Comp. Stat. 1901, p. 3200), the indictment being in eight counts.⁵⁹

Each of the counts in question charges the defendants and others with engaging in a conspiracy “in restraint of, and to restrain,” by the method therein described, “trade and commerce among the several states” in the supply of cotton available during the year ending September 1, 1910, such supply consisting of all the cotton grown in the Southern states in that year and the cotton left over from prior years.

⁵⁹ A part of the statement of facts is omitted.

The counts are long, and the acts which the Circuit Court treated as charged in them are indicated by the following excerpt from its opinion, the footnotes being ours:

"These counts are alike, with the exception of the statement of overt acts, and each may be, broadly speaking, divided into three parts, which may be thus summarized:

"(1) The charging part contains a general charge of conspiracy in restraint of interstate commerce, with the usual formal and jurisdictional averments.

"(2) The second part contains a 'description of the trade and commerce to be restrained.' Under this head it is stated, in substance, that cotton is an article of necessity raised in the Southern states, which moves in a large volume in interstate and foreign commerce, and that it is bought and sold upon the New York Cotton Exchange to such an extent as to practically regulate prices elsewhere in the country, so that future sales by speculators upon such exchange of more than the amount of cotton available at the time of delivery would create an abnormal demand and resultant excessive prices in all cotton markets.

"(3) The third part contains a 'description of the method devised and adopted by the conspirators for restraining the trade and commerce.' It is alleged, at the outset, that the conspirators were to restrain trade and commerce by doing 'what is commonly called running a corner in cotton.' Averments then follow showing how the corner was to be brought about and its effect, which may be thus analyzed:

"(1) The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for future delivery, greatly in excess of the amount available for delivery when deliveries should become due.

"(2) By these means an abnormal demand was to be created on the part of such sellers, who would pay excessive prices to obtain cotton for delivery upon their contracts.

"(3) The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

"(4) 'As a necessary and unavoidable result of their acts, said conspirators were to compel' cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs, or else curtail their operations.

"(5) And also, as 'a necessary and unavoidable result' of said acts, an unlawful obstruction would be put upon interstate trade and commerce.

"The offense charged, then, is a conspiracy in restraint of trade through the operation of a 'corner.'"⁶⁰

Its opinion, given at the time, although not containing any express ruling upon the point of difference, shows that the counts were treated

⁶⁰ It was first held that the court had no power to determine whether all the elements of a "corner" were alleged, because it had no power to construe the counts on this writ of error.

as alleging an operative scheme,—one by which the market could be cornered. The court spoke of it as “contrary to public policy,” as “arbitrarily controlling the price of a commodity,” and as “positively unlawful in any state having a statute against corners.” Evidently, it was assumed that every element of running a corner was present. We accordingly indulge that assumption, but have the parties free to present the question to the district court for its decision in the course of such further proceedings as may be had in that court.

We come, then, to the question whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the states, and thereby to enhance artificially its price throughout the country, and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of § 1 of the anti-trust act, which makes it a criminal offense to “engage in” a “conspiracy in restraint of trade or commerce among the several states.” The circuit court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce, and agree to suppress competition among themselves,⁶¹ (2) that running a corner, instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling, and that the answer to the question must be in the affirmative.

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein. *Loewe v. Lawlor*, 208 U. S. 274, 293, 301, 52 L. Ed. 488, 496, 502, 28 Sup. Ct. 301. As was said of this section in *Standard Oil Co. v. United States*, 221 U. S. 1, 59, 55 L. Ed. 619, 644, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734:

“The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, be-

⁶¹ The discussion of this point is omitted.

cause it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense."

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. * * *

As we are of opinion that the statute does embrace the conspiracy which the Circuit Court treated as charged in counts 7 and 8, as construed by it, its judgment upon those counts is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed in part.

Mr. Justice LURTON, dissenting.⁶²

Mr. Justice HOLMES also dissents.

⁶² This dissenting opinion is omitted.

CHAPTER III

MULTIPLE PHASE COMBINATIONS

LIVE STOCK ASS'N of NEW YORK v. LEVY.

(Superior Court of New York, 1886. 54 N. Y. Super. Ct. 32.)

O'GORMAN, J. The facts on which the contention arose are these: The plaintiff is a corporation formed under the law of this state, for the purpose of buying and selling sheep and lambs. The defendant is one of the stockholders of the corporation. On January 8, 1884, the plaintiff corporation, with the consent and approval of its stockholders, of whom the defendant was one, entered into an agreement in writing with a corporation called "the New York & New Jersey Sheep Brokers' Association," that the stockholders of the plaintiff corporation, should, for a period of three years thereafter, buy their sheep and lambs from members of the said Sheep Brokers' Association only; that the members of the Sheep Brokers' Association should, during the same period, sell sheep and lambs for the New York market, to the stockholders of the plaintiff only.

This was a renewal of a similar agreement, the term of which had expired, and during the existence of which, the stockholders of the plaintiff corporation had derived annual dividends of about one hundred and forty (140) per cent. on their investments.

For the purpose of enforcing on the stockholders of the plaintiff corporation compliance with the terms of this agreement of January 8, 1884, the stockholders of the plaintiff corporation, including the defendant, entered, on January 25, 1884, into an agreement with each other and with that corporation, that each of them should pay to the plaintiff corporation the sum of twenty-five dollars for each car load of sheep and lambs purchased by him from any individual or firm, member of the said Sheep Brokers' Association after having been notified by the plaintiff not to purchase.

The defendant did purchase from a firm member of the Sheep Brokers' Association after having been notified not to do so, and this action is brought to recover seventy-five dollars due by him to the plaintiff under the last mentioned agreement.

These facts are admitted, and the defendant's contention is that the contract of January 8, 1884, was void as being ultra vires, and also in restraint of trade.

It is not alleged in defendant's answer that that agreement was made with any intent, fraudulent or unlawful, or that it had for its purpose or effect the limiting or circumscribing the energies or productiveness, or usefulness to the public of either of these corporations.

The force of the contract was confined as to duration to three years, and as to the sphere of its influence to the New York market.

It does not appear that this contract was directly or impliedly prohibited by the act under which the plaintiff corporation was organized, or by any statute of this state, or that it was beyond the limit of powers ordinarily vested in corporations for the necessary promotion of their business and fairly implied in the act of incorporation.

The defendant was one of the stockholders who executed it. He, in company with the other stockholders, shared in large pecuniary advantages derived from a similar contract, which had previously existed, and by executing the contract the legality of which he now impugns, entitled himself to like advantages.

As far then as the contract was between him and the plaintiff corporation, defendant is estopped now from setting up that it was ultra vires. *Kent v. Quicksilver, etc., Co.*, 78 N. Y. 159; *Sheldon, etc., Co. v. Eickemeyer, etc., Co.*, 90 N. Y. 607; *Whitney Arms Co. v. Barlow*, 63 N. Y. 69, 20 Am. Rep. 504.

It should be remarked also, that here the defendant contracted not only with the defendant corporation but with the other stockholders, and that contract was mutually binding. The objection then that the contract was not binding on defendant, as being beyond the power of the corporation to execute, is without merit.

Neither was the contract of January 8, 1884, void as being in unlawful restraint of trade. It cannot be successfully contended that that contract involves any restraint of trade on the part of either of the corporations.

As I have before stated, the contract is limited as to its duration, and its effective operation is confined to the city of New York.

There is no violation of law or of public policy in an agreement between two traders, that one should sell to the other all its commodities and the other buy from the former corporation alone. *Chitty on contracts* (11th Am. Ed.) 982, 983, and notes. A contract to sell exclusively to a particular person for a limited time is not invalid (*Van Marter v. Babcock*, 23 Barb. 633); nor a contract not to engage in a special business for a certain period (*Curtis v. Gokey*, 68 N. Y. 304).

The law will not presume an agreement to be void, as against public policy, when it is capable of a construction which would make it valid.

The order appealed from is affirmed, with costs.

INGRAHAM, J., concurred in the result.

SEDGWICK, C. J., not voting.

JUDD v. HARRINGTON.

(Court of Appeals of New York, 1893. 139 N. Y. 105, 34 N. E. 790.)

Action by Sylvanus Judd, treasurer of the New York & New Jersey Sheep Brokers' Association, against Dennis Harrington, for a penalty for breach of contract. From a judgment of the General Term (19 N. Y. Supp. 406) affirming a judgment for defendant, plaintiff appeals.

O'BRIEN, J. The plaintiff, as treasurer, of an association called the New York & New Jersey Sheep Brokers' Association, sued to recover \$10,000, stipulated as liquidated damages in a contract entered into between the association and the defendant. He was defeated in the action, and one of the questions presented is whether the contract is of such a character as to entitle the plaintiff to invoke the aid of the court for its enforcement. The contract was executed, as appears from its date, on the 11th of April, 1887, and was to be operative from the 1st of January preceding. The parties who signed the agreement were brokers and dealers in sheep and lambs consigned to market in New York and vicinity. The paper recites that the persons signing the same, of whom the defendant was one, had associated themselves together for the purpose of guarding and protecting their business interests from loss by unreasonable competition, and that they had agreed to pool and make a common fund of all commissions earned in the sale of sheep and lambs, excepting such as it was agreed should be paid to the Sheep & Lamb Butchers' Benefit Association of the City of New York.

All the members of the association thus formed by the agreement then proceeded to enter into various stipulations with each other. Those that are material to the question involved are as follows: (1) That all members of the association thus formed, and every one subsequently admitted, should keep a just and true account of the number of sheep and lambs sold by them or their firms, by correct entries to be made in a book to be kept for that purpose; that at the close of each week, or within two days thereafter, a written statement from the books was to be made by each member to the treasurer, showing the full amount of sheep and lambs sold during the week, which statement the treasurer was to enter in a book to be kept by him, and at the same time file the statement for reference. (2) At the close of each month a settlement between the members was to be made, and the treasurer was to ascertain the total number of sheep and lambs sold, and the total sold by each member, and make a statement of the same, a copy of which, within two days thereafter, was to be delivered to each member, who was, within three days thereafter, to pay to the treasurer eleven and three-fourths cents per head for each and every sheep and lamb sold by him or his firm during the month, as appeared from the treasurer's statement. Then the treasurer was to distribute the fund between the members according to the percentage of the whole fixed by

the agreement. (3) All moneys which the treasurer was to receive from the butchers' association above mentioned were to be divided between the members in the same way. (4) For a violation of this agreement, each member is to pay the treasurer \$10,000, to be divided between the members in the same way. It is alleged that the defendant carried out the agreement on his part until about February 1, 1889, when he refused to abide by it, and from that date wholly failed and refused to render to the treasurer the account and statement provided for in the agreement.

On the 26th of December, 1886, the brokers' association, formed as above described, and represented in this action by the plaintiff, and the butchers' association above mentioned, and referred to in the agreement, entered into a mutual agreement with each other, to take effect at the same date as the one above described, to wit, January 1, 1887. This agreement recited that the brokers were engaged in selling, and the butchers in buying, sheep and lambs for slaughter, and that it was for the interest of both that they should be closely connected in business, and should mutually aid and protect each other as thereafter set forth. The brokers bound themselves to keep correct books of account, showing the number of sheep and lambs sold by them on the market, and at the close of every month to render a full and true statement of all such sales to the secretary of the butchers' association, and at the same time pay to said secretary three and one-fourth cents per head for each and every sheep and lamb sold. The brokers further agreed: (1) Not at any time during the term of the agreement to engage in, or be directly or indirectly engaged in, slaughtering sheep or lambs, except for export. (2) Not to sell any sheep or lambs to any one else except the members of the butchers' association and if they did they were bound to pay the treasurer of the last-named association 15 cents per head for the same. Any sales so made were to be reported every week, and payment made on account thereof. The butchers agreed to report to the brokers the names of all members of the association, including new members to be added from time to time; that they would buy sheep and lambs from the brokers only, and, if from any other parties, they would pay over to the brokers, on account thereof, fifteen cents per head, which purchases were to be reported to the brokers every week.

These two papers must be read together, and, thus considered, they manifestly were intended for the purpose of creating a combination between the butchers engaged in buying, and the brokers engaged in selling, sheep and lambs, in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers, and the butchers to buy only from the brokers. The owners of sheep, or the drovers or consignees who had them for sale, and the public who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement. Whether they were, in fact, is not

material. The real purpose and intent of the agreement were to suppress competition in an article of food, and, as such agreements tend to enhance the price, they are regarded as detrimental to the public interest, and forbidden by public policy. That such agreements are illegal and void has been settled by the decisions of the courts from the earliest times. These authorities are to be found in the learned opinion below, and upon the briefs of counsel in this court; but I do not consider it necessary to refer to them further, or to discuss the question at length, for the reason that at this very term of the court the whole question has been examined, elaborately discussed, and decided in another case. *People v. Sheldon* (Oct., 1893) 34 N. E. 785; *Id.*, 66 Hun, 590, 21 N. Y. Supp. 859.

Courts will not aid parties seeking to enforce such an agreement (*Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707), irrespective of the question whether, in fact, it produced the evil results to which it tended, or was harmless. It is said that the purpose was to facilitate the transaction of business, and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be said of nearly all such combinations, but that circumstance cannot save them from condemnation, when they tend to prejudice the public. The illegal character of the agreement appeared upon its face, and was a necessary legal conclusion from its provisions. It was doubtless the duty of the court to dispose of the case as presenting a question of law, but the illegal intent and purpose having been found by the jury, when the court was bound to declare it, the plaintiff is not injured by the ruling at the trial submitting the case to the jury on the question of the purpose and intent of the agreement. The right of the plaintiff to recover when no actual damages have been alleged or proven, and some other questions, are involved in the case, but it is unnecessary to consider them, as the illegal nature of the agreement sued upon is a fundamental objection to a recovery.

The judgment should be affirmed, with costs. All concur; GRAY, J., in result.

HAWARDEN v. YOUGHIOGHENY & L. COAL CO.

(Supreme Court of Wisconsin, 1901. 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.)

Action by Edward Hawarden against the Youghiogheny & Lehigh Coal Company and others. From an order overruling defendants' demurrer as to the first cause of action stated in the complaint the Youghiogheny & Lehigh Coal Company appeals.¹ * * *

There are twenty-three defendants, who are divided into two class-

¹ So much of the case as relates to a second cause of action stated in the complaint is omitted, and the statement of the first cause of action, abridged.

es; the first class being composed of certain foreign corporations and their agents at Superior, Wis., who are termed in the complaint as "wholesalers," and the second class composed of certain retail coal dealers in Superior, who are called "retailers." The first alleged cause of action states, in substance: That "between August 1, 1900, and September 15th, the wholesalers united * * * into a * * * combination in restraint of trade, * * * and renewed and extended the scope of a previously existing concert, and created an active, vicious, and damaging * * * monopoly designed to * * * control the retail coal trade in and about the city of Superior, and to hinder * * * the plaintiff in his means of livelihood, and to damage his property. That prior to September 15th the coal trade at Superior was carried on upon this plan: The wholesalers did not directly solicit retail trade of consumers, but sold to all retail dealers at the market price, and they resold to the public * * * at such price as they saw fit, without interference * * * from the wholesalers. That after September 15th the wholesalers refused to sell plaintiff coal at any price, * * * and the retailers refused to sell him coal at wholesale rates, and they arrogate to themselves the privilege of retailing coal in Superior, backed up, * * * by the wholesalers. That the wholesalers gave exclusive right to retail coal from their docks to the retailers, and determine at what dock any retailer should be permitted to buy coal * * * and of whom they should not be allowed to purchase."

The complaint further alleges "that the limitation of retailers was for the purpose of controlling retail prices of coal in Superior, to force out of the retail coal trade all persons obnoxious to the wholesalers, and among others the plaintiff, to secure large profits to the wholesalers and the retailers, to deprive the public of free competition in the retail coal trade, to create and maintain a monopoly of the coal trade; that the retailers agreed with the wholesalers not to cut * * * prices prescribed by the wholesalers, to not invade each other's territory, * * * not to sell for the purpose of resale to any person not elected by the wholesalers to the privilege of retailing coal in Superior, * * * and to forego the honorable name of retail coal merchants and assume the name of sales agents; * * * that on or about the 10th day of September, 1900, the wholesalers and retailers put said contract, * * * in force against the plaintiff and the public; that the refusal to sell coal to the plaintiff is done in pursuance of, * * * the purposes of said combination; * * * that about two-thirds of all fuel used in Superior is coal bought directly or indirectly of the wholesalers; that the wholesalers own practically all the coal docks in Superior, Wis., and Duluth, Minn., engaged in local trade at those points; that at the same time the action of the wholesalers and the retailers forced out of business 10 or more other retail coal dealers in Superior, and thereby they have established a monopoly of the coal trade in the city, * * * and raised the price.

of coal to the people of Superior; * * * that, as a result of said conspiracy, plaintiff, Hawarden, was forced out of the business, and his trade destroyed, thereby suffering damage in the sum of \$500."

WINSLOW, J. * * * Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making great gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, it was, in effect, repudiated. It is true that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice Marshall it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable. "Where the act is lawful for an individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it."

These principles are decisive as to the first count in this complaint. The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegations of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has

resulted, and hence that a cause of action at law for damages is stated. The conclusion reached renders it unnecessary to consider the effect of section 1747e, Rev. St. 1898, with regard to combinations in restraint of trade or commerce. * * *

judgment

JOHN D. PARK & SONS CO. v. NATIONAL WHOLESALE
DRUGGISTS' ASS'N.

(Court of Appeals of New York, 1903. 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578.)

Action by the John D. Park & Sons Company against the National Wholesale Druggists' Association and others. From a judgment of the Appellate Division (66 N. Y. Supp. 615) affirming a judgment of the Special Term sustaining demurrers to the complaint, plaintiff appeals.

HAIGHT, J.² * * * The relief sought by the plaintiff is an adjudication that the resolutions, agreements, plans, and modes for the conducting of the business of the sale of proprietary medicines by the National Wholesale Druggists' Association are illegal, and that an injunction issue, restraining the members of the association from continuing to make efforts to induce any manufacturer or proprietor of * * * proprietary medicines from adopting the rebate or contract plan for the sale of their goods, or of continuing such plan if they have previously adopted the same. * * *

It appears from the allegations of the complaint that the matter in controversy has reference to the sale by manufacturers of those particular medicines covered by trade-marks, copyrights, or patents, which secure to the manufacturer * * * the exclusive right to manufacture and sell the same. These medicines are known as "proprietary goods," and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price, and adopt such plan for the sale thereof as he, in his judgment, may determine. At one time the sale of these goods was largely made through traveling sales agents, who worked upon commissions, and supplied the goods to the consumer or retailer. Later on they were sold largely through the druggists, but many of the manufacturers did not maintain a uniform price. They would supply goods to some of the wholesalers upon more favorable terms than to others; thus permitting large dealers to make a profit, while a great number of the smaller druggists found the handling of proprietary goods unprofitable.

This resulted in the organization of the National Wholesale Druggists' Association, an unincorporated body, which in 1882 and 1883 represented 90 per cent. of the wholesale jobbing trade of the United

² This opinion has been slightly abridged.

States. At a meeting of this association a plan was devised and adopted for the conduct of the business of the sale of proprietary goods, which was in the form of a petition addressed to the proprietors, asking them to fix a uniform jobbing price for fixed quantities, and also a selling price by the druggists, which they were to agree to maintain, and that the druggists should be allowed the difference between the jobbing and the selling price as their profit or rebate, which they asked should be not less than 10 per cent.; the proprietors defraying the expenses of boxing and freight to the nearest transportation station of the buyer. It is alleged that a large number of the proprietors. * * * adopted the plan suggested by the wholesale druggists. And this mode of conducting the business appears to have been continued until the December meeting of the association, in 1893, at which time a committee, to whom the Detroit plan, so called, had been referred, reported, among other things, the following: "That in order to strengthen and render this plan more effective, it is respectfully recommended that proprietors accept orders for full quantities with rebate, discounted only from regular houses recognized as belonging to the number who will faithfully observe the prices and conditions established by the manufacturers."

This appears to have been adopted and was acquiesced in by the manufacturers, and became the plan under which the business was conducted at the time this action was commenced. It further appears from the allegations of the complaint that the plaintiff never acquiesced in this plan of conducting the business, * * * and would not be bound by the price established by the manufacturers; that thereupon the manufacturers refused to sell goods to the plaintiff, and it was compelled to procure goods from other druggists; that the National Wholesale Druggists' Association caused the plaintiff's premises to be watched by spies or detectives and that they made reports to the manufacturers of the druggists who purchased goods of the proprietors and caused them to be delivered at the plaintiff's premises; and that the association also furnished the manufacturers with a list of all of the druggists throughout the United States who were willing to be controlled by the contract plan. The complaint then alleges that the defendants "were combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, * * * and to control the methods upon which the said trade shall be carried on throughout the entire United States, and to control the prices at which, and * * * the terms upon which the said proprietary goods shall be sold to the various retail druggists throughout the United States, and to destroy and prevent * * * all competition between the said wholesale and jobbing druggists in the wholesale and jobbing trade * * * and restrict the business of each of the wholesale and jobbing druggists,

* * * to certain exclusive territory, tributary or proximate to each of them, respectively."

The demurrer is an admission of the facts alleged, but not of the conclusions of law. The allegations just above quoted I understand to be conclusions of law drawn from the allegations of fact alleged in the complaint, and are not therefore admitted by the demurrer. It therefore becomes necessary to determine whether the plan * * * is lawful. The question thus presented is of considerable importance. The plan, as we have seen, in its substantial features, has been in operation nearly 20 years, and in its final, completed form, nearly 10 years. This plan, as I understand, is not one confined to the sale of proprietary medicines, but is one that has been adopted by many manufacturers of merchandise and other goods where manufacturers have established a trade-mark, and have gained a reputation which they wish to maintain throughout the country for character, quality, and durability of the goods which they manufacture. They have consequently established prices at which their goods shall be sold to the consumer, and require all wholesale and retail dealers to supply the consumer at the price list established. * * *

It is said that the National Wholesale Druggists' Association was organized and continued for the purpose of monopolizing and controlling the business of the wholesale druggists and jobbers in the sale of proprietary or patent medicines in the United States. The association doubtless was organized and continued for the purpose of devising and procuring to be carried into effect a plan for the sale of such goods throughout the United States, which would do away with the necessity of maintaining traveling sales agents, and which would secure to the dealers a uniform commission for the handling of the goods; but I do not understand that this was the establishing of a monopoly on the part of the members of the association, for, under the plan adopted, every dealer has the right to purchase goods from the manufacturers upon the same terms as the members of the association, with the right to the same rebate or commissions upon complying with the requirements of the manufacturers with reference to following their price list in making sales of goods.

The members of the association clearly had the right to work for their own interests. They had the right to devise and adopt a plan for the conduct of the business in which they could make a commission or a profit, so long as they did not unlawfully interfere with the rights of others. They had the right to petition the manufacturers to adopt the plan devised by them, and to support their petition with all of the arguments and persuasions that they could bring to bear, so long as they did not resort to threats or intimidation. The proprietors, having the exclusive right to manufacture and sell their goods, had the right to adopt such plan with reference to the disposal thereof as they saw fit; and if they became convinced that the contract or rebate plan, so

called, was more advantageous to them, and more fair and just to the public, by establishing a uniform price in all sections of the country, they had the right to adopt the same, and no one could complain.

Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor.

Is this plan against public policy? An active competition and rivalry in business is undoubtedly conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein, and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. While public policy demands a healthy competition, it abhors favoritism, secret rebates, and unfair dealing, and commends the conduct of business in such a way as to serve all consumers alike. That this is the tendency of modern times is evident from the recent discussions and legislation upon the subject of interstate commerce.

One of the cardinal and chief principles of the plan adopted is the establishing of a uniform price by proprietors, which necessitates the service of all persons alike throughout the United States; the proprietors subjecting themselves to the extra expense for freight, etc., in remote sections of the country. I can discover nothing in this which is detrimental to the public policy of the country. The right would certainly not be denied to the manufacturer of a given remedy to adopt the rule that he would only sell it to the jobbers of the country at a certain long price, and would not allow a discount of 10 per cent. where they refused to maintain his price. In other words, the manufacturer says to the jobbers of the country: "I manufacture a medicine that I will sell for one dollar a bottle, and it is my desire that it shall be sold at that price per bottle throughout the country. If you will take consignments of this medicine from me, billed to you, at that price per bottle, I will allow you a rebate of ten per cent.; and, if I find that you are selling at a lower price than billed to you, I will allow no rebate. If this arrangement is not satisfactory to you, I prefer to keep

my manufactured stock on hand. These are the only conditions under which I will ship my manufactured article." Surely there is nothing in this approaching restraint of trade or the violation of the principle of public policy. It is simply allowing a man to do what he will with his own.

I do not understand that the complaint charges that the manufacturers were compelled to adopt the plan by reason of threats or intimidation on the part of the members of the association. It is true that the complaint contains the allegation, repeated a number of times, to the effect that the proprietors or manufacturers were prevented from selling the plaintiff proprietary goods for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and also that at one of the meetings of the association the committee on proprietary goods reported that, with a few exceptions, the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and then concluded its report with the recommendation "that continued and untiring opposition be shown to the sale of the articles of those proprietors who do not adopt said contract or rebate plan for the sale of their goods, or who withdraw from the plan." There is no allegation, however, that this resolution was served upon the proprietors, or was otherwise presented to them.

The first allegation alluded to does not, as I understand it, amount to a threat, when taken in connection with the other allegations of the complaint with reference to the plan devised for the conduct of the business. The proprietors might well deem it to be for their best interests to act in accord with the wishes of the druggists, rather than those of the plaintiff. As to the second allegation, untiring opposition was to be continued against the sale of articles of proprietors who did not accept the contract plan, or, in other words, to the sale of proprietary goods under the old system. I do not understand that by this allegation it was intended to charge that the plan adopted prohibited druggists from dealing with proprietors or manufacturers who did not adopt the contract plan with reference to the sale of proprietary goods, for, under other allegations of the complaint, it appears that the failure of a manufacturer to adopt the plan simply left his goods upon the unrestricted list, for which druggists could contract in such manner as they saw fit. This is apparent from the resolution adopted by the association at its Washington meeting in 1890.

Is there any boycott of the plaintiff? It is true, many of the proprietors refused to sell to the plaintiff proprietary goods except at the long price, which I understand to be the selling price. They have refused to allow it commissions or a rebate upon the goods purchased, but this refusal is based upon the ground that the plaintiff refused to sell at the prices fixed by the proprietors. The plaintiff can at any time avail itself of the right to purchase upon the contract plan by complying with the requirements of the proprietors. * * *

Complaint is made with reference to the watching or spying upon plaintiff's business. All there is of this is the watching for the purpose of determining who the druggists were that furnished the plaintiff with proprietary goods in violation of the contract plan under their agreements with the proprietors. I think there is nothing in this calling for the intervention of a court of equity. The whole success of the plan adopted for conducting the business depended upon the faithful observance of the contract of the druggists with the proprietors, for whom they were acting as agents. If one could be permitted to violate his contract, it would seriously prejudice all the dealers who lived up to the provisions of their contract, and carried it into execution in good faith. * * *

I am thus brought to a consideration of the reasons for objecting to the plan by the plaintiff. As stated in the allegations of the complaint, they are as follows: "That all of the said manufacturers and proprietors who have adopted the said rebate or contract plan for the sale of their respective proprietary goods were persuaded to adopt it entirely by the representation of the benefit which would accrue to the majority of their distributing agents or vendees, the wholesale and jobbing druggists, who were unable to handle the goods as cheaply as the few who could command large capital." It is also alleged that the firm of John D. Park & Sons, and this plaintiff since its organization, before the happening of the matters alleged in the complaint, had made large purchases, as wholesale and jobbing druggists, of the proprietary goods of all or nearly all of the various manufacturers, and, had it not been for the happening of the matters set forth in the complaint, it would have continued to make large purchases, as wholesale and jobbing druggists, of such goods, and would have been an active and constant competitor of all the other wholesale and jobbing druggists in the United States.

The meaning of these allegations is obvious. It is that the plaintiff, or the firm of John D. Park & Sons, of which the plaintiff is successor, could command large capital, and by reason of this they could purchase proprietary goods in large quantities and more cheaply than the other wholesale and jobbing druggists, and that by reason of the adoption of the contract plan the plaintiff was unable to so do. Under the contract plan the prices of these goods were made uniform for fixed quantities, and dealers possessing large capital, and thereby enabled to purchase in large quantities, could not purchase for a less sum than the ordinary wholesale and jobbing druggist, and, not being able to purchase for a less sum, could not handle the goods more cheaply. The situation is not new. It is one to which the attention of the public has been frequently drawn in recent years. The great merchants, possessed of large capital, will persuade and induce manufacturers to sell to them more cheaply in consequence of their taking large quantities, and thus they are enabled to undersell and drive out of business the small merchants in their vicinity. I am not here going to question the

right of the big fish to eat up the little fish—the big storekeeper to undersell and drive out of business the little storekeeper—but I do believe that the little fellows have the right to protect their lives and their business, and if they can, by force of argument and persuasion, induce manufacturers to establish a uniform price for fixed quantities, so that they can purchase as cheaply as the great merchants, and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege.

The authorities have been largely discussed by my associates. I do not understand that we widely differ with reference to the law. Our chief controversy appears to arise out of the different conclusions to which we have arrived with reference to the allegations of facts contained in the complaint.

The judgment should be affirmed, with costs.³

O'BRIEN and BARTLETT, JJ., concur with HAIGHT, J., and PARKER, C. J.

VANN, J., concurs with MARTIN and CULLEN, JJ.

Judgment affirmed.

W. W. MONTAGUE & CO. v. LOWRY.

(Supreme Court of the United States, 1904. 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.)

This action was brought under § 7 of the act of July 2, 1890 (26 Stat. 209, c. 647, U. S. Comp. Stat. 1901, p. 3202), commonly called the Anti-Trust Act.⁴

Plaintiffs in error (defendants below) seek to review the judgment of the Circuit Court of Appeals for the Ninth Circuit (52 C. C. A. 621, 115 Fed. 27), affirming a judgment for plaintiffs, entered in the Circuit Court for the Northern District of California, upon a verdict of a jury (106 Fed. 38).

It appeared in evidence on the trial in the United States Circuit Court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in * * * San Francisco, * * * California, and dealing in tiles, mantels, and grates, and that The Tile, Mantel, & Grate Association of California, and the officers and members thereof, had since on or about the ——— day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the state of California, and such organization was also com-

³ The concurring opinion of Parker, C. J., and the dissenting opinion of Martin, J., are omitted.

⁴ The statement of facts is abridged by numerous omissions.

posed of the manufacturers of tiles, mantels, and grates, who were residents of other states, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the state of California. There were no manufacturers of tiles within the state of California. * * *

The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fire place fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution (article I, § 1) it was provided that any individual, corporation, or firm engaged in or contemplating engaging in the tile, mantel, or grate business in San Francisco, or within a radius of 200 miles thereof (not manufacturers), having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fire-place fixtures throughout the United States might become nonresident members of the association. * * * The initiation fee was, for active members, \$25, and for nonresident members \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against nonresidents.

An executive committee was to be appointed whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III:

"Sec. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association."

"Sec. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel, & Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "un-set" tile were sold by a member to any one not a member, they were sold at the list prices so adopted, which were more than 50 per cent. higher than when sold to a member of the association. * * *

The plaintiffs were not members of the association and had never been, and had never applied for membership therein, and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tile from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than 50 per cent. over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tile from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying \$3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for \$500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee,⁵ was entered for the plaintiffs.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called Anti-Trust Act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The nonmember dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member,

⁵ So much of the opinion as holds the fee allowed reasonable is omitted.

excepting at a greatly enhanced price over what he would have paid to the manufacturer or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the nonmember as already stated.

The plaintiffs endeavored in vain to procure tile for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several states refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to any one not a member of the association for less than list prices, which are more than 50 per cent. higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tile is, as we have said, not only narrowed, but the prices charged by the San Francisco dealers for the unset tile to those not members of the association are more than doubled.

It is urged that the sale of unset tile, provided for in the seventh section of the by-laws, is a transaction wholly within the state of California and is not in any event a violation of the act of Congress which applies only to commerce between the states. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1 per cent. of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their nonmembership therein

from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbitrarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable, the applicant would not be admitted, and whether they were or not was a matter for the arbitrary decision of the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution because they did not always carry stock worth \$3,000, which, by section 1 of article I, was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by any one who could not come up to the condition. The case stands, therefore, that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tile as they had been accustomed to do before the association was formed.

The consequences of nonmembership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tile were enhanced so far as plaintiffs were concerned, and how, by means of this combination, interstate commerce was affected.

The purchase and sale of tile between the manufacturers in one state and dealers therein in California was interstate commerce within the

Addystone Pipe Case, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the states. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249, did not, therefore, cover it. It is not brought within either *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. 40, or *Anderson v. United States*, 171 U. S. 604, 43 L. Ed. 300, 19 Sup. Ct. 50. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject-matter of the agreement did not directly relate to, embrace, or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it. * * *

The judgment is affirmed.

KLINGEL'S PHARMACY v. SHARP & DOHME. ET AL

(Court of Appeals of Maryland, 1906. 104 Md. 218, 64 Atl. 1029, 7 L. R. A. [N. S.] 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.)

McSHERRY, C. J.⁶ To the declaration the defendants demurred, and the superior court of Baltimore City sustained the demurrer and entered judgment for the defendants for costs, and from that judgment this appeal was taken.

The declaration avers that * * * the plaintiff is a duly-licensed, incorporated retail vendor of drugs; * * * that it was and still is able, ready, and willing to pay cash for all kinds of drugs * * * needed by it; * * * that the defendants the Calvert Drug Company and Sharp & Dohme are corporations which have been for some time and still are engaged in the business of selling drugs; * * * that the other defendant, the Baltimore Retail Drug Association, is a corporation organized for the purpose, amongst other things, of unlawfully maintaining amongst dealers in drugs * * * the maximum rate schedule of prices and of preventing, in restraint of trade, all vendors of drugs * * * who are unwilling to * * * submit to the prices so fixed by it, from buying at any price the drugs * * * needed * * * by them in their business, by the unlawful coercion of threats that * * * all vendors of drugs * * * who shall sell for less than the schedule prices shall be themselves blacklisted, and all sales of drugs * * * be refused them; that all

⁶ Parts of the recital of the facts and of the discussion of the question involved are omitted.

the members of said retail drug association are bound by an agreement not to sell such supplies to any person or corporation who will not agree to maintain its maximum schedule of prices; that the plaintiff has steadily refused to become a member of said Baltimore Retail Drug Association; * * * that though the plaintiff has repeatedly applied to the Calvert Drug Company and to Sharp & Dohme and to sundry other druggists to sell to it drugs * * * tendering itself ready, able, and willing to pay cash, yet the said defendants and said other druggists have refused to sell it drugs * * * at any price whatsoever, because of said unlawful conspiracy * * * coupled with the threat that, for any violation of such unlawful combination * * * the parties violating it should themselves be blacklisted and all sales be refused to them; that the avowed object of the conspiracy was and is to maintain in restraint of trade a maximum price of drugs, * * * and to compel the plaintiff to become a member of said combination and to agree to charge all its customers such maximum price or to be driven out of business; * * * that the action of the defendants is not an action taken by them in the bona fide exercise of their supposed right to sell or to refuse to sell to whomsoever they please, nor in the bona fide exercise of their supposed right to advise other vendors as to selling or not selling their drugs and druggists' supplies, but, on the contrary, that by the said combination and conspiracy the defendants did wrongfully and maliciously intend to injure and destroy the plaintiff's business, which they have succeeded in doing; and that such injury to the business of the plaintiff is the direct result of said illegal, malicious, and wrongful conspiracy and of the acts done in furtherance thereof. * * *

By sustaining the demurrer, the superior court held that these facts, if true, did not constitute a valid cause of action. We are not apprised by the record as to the ground upon which the trial judge based his decision. But the reasons assigned in the brief of the appellees to sustain that ruling are, first, because (a) an agreement or conspiracy not to sell to the plaintiff is not actionable, and because (b) no facts are alleged that amount to unlawful coercion by the defendants to the damage of the plaintiff; secondly, because the declaration is bad for misjoinder. These grounds are not tenable, as we shall see in a moment. They have been assumed obviously in consequence of a misinterpretation of the averments of the narr.

In the last analysis it will be seen that there are three salient facts averred in the declaration. First. A combination to exact and maintain a maximum schedule of prices for drugs * * * is asserted to exist between the defendants and others in restraint of trade. That combination, if it does exist, and we are bound to assume that it does when dealing with the issue raised by the demurrer, is a criminal conspiracy at the common law and is punishable by fine and imprisonment after indictment and conviction. It is the offense of forestalling the

market, and is defined to be every practice or device by act, conspiracy, words, or news to enhance the price of victuals or other merchandise. Roscoe, Ev. 437; 3 Inst. 196; 3 Bac. Ab. 261; 1 Russ. 169. As it creates a monopoly it was held to be unlawful at the common law as being in restraint of trade and against public policy. *Mitchel v. Reynolds*, 1 P. Wms. 181. * * * In the United States, whilst we hear little now about forestalling, engrossing, or regrating, we hear much of "corners" and "trusts" which are, in many instances, the old offenses under new names, since they are frequently attempts by a combination or conspiracy of persons to monopolize an article of trade or commerce and so to enhance its price. Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade: *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 244, 20 Sup. Ct. 96, 44 L. Ed. 136.

Though this was said by the Supreme Court in a case which arose under the anti-trust act of Congress of July 2, 1890, it equally applies to combinations and conspiracies of the character described in the declaration set forth in the record now before us. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; and the same proposition in one form of expression or another is laid down in all the criminal law. *Bish. Cr. L.* § 172; *Desty, Cr. L.* § 2; 3 *Chitty, Cr. L.* § 1138; *Arch. Cr. Pr.* 1830. A "corner," when accomplished by confederation to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159; *People v. Melvin*, 2 *Wheeler, Cr. Cas. (N. Y.)* 262; *People v. North River Sugar Refining Co. (Sup.)* 3 N. Y. Supp. 401, 2 L. R. A. 33 and notes. In *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184, it was ruled that an action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage. The cases of *Kimball v. Harman & Burch*, 34 Md. 407, 6 Am. Rep. 340, and *Robertson v. Parks et al.*, 76 Md. 118, 24 Atl. 411, decide nothing at variance with the principles just stated. * * *

The second salient fact averred in the narr. consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold: First, a refusal by the defendants to sell to the plaintiff, an act they would have the legal right to do, if when done it were not done in the execution of and to carry into effect a criminal con-

spiracy in restraint of trade; and, secondly, coercion and intimidation practiced by the defendants upon other vendors of like commodities, by means of threats to blacklist and to boycott such vendors, if they sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from selling those articles to the plaintiff, unless it joined the association.

"It is a part of every man's legal rights," said Judge Cooley, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley, Torts, 278. Again: "The exercise by one man of his legal right cannot be a legal wrong to another. * * * Whatever one has a legal right to do another can have no right to complain of." *Id.* 688. It was upon this principle that the decision in *Bohn Manf. Co. v. N. W. Lumbermen Ass'n*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, was placed. * * *

Each member of the association had the legal right to refuse to sell the lumber which he owned, if he saw fit to refuse, and the collective refusal of all the members was equally lawful. So, too, the defendants in this case had a perfect legal right to refuse to sell to the plaintiff any drugs and druggists' supplies owned by them, and it would have been wholly immaterial whether that refusal was the result of whim, caprice, prejudice, or malice, if the bare refusal to sell had been the head and front of their offending. But the refusal to sell was not the exercise of a legal right, if that refusal were a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. Whilst an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of by only one, yet the same act may be unlawful when it is a means of accomplishing an unlawful end. An act performed in furthering an unlawful enterprise cannot be a lawful act, though the same act would be free from censure if done with some other view. If it be conceded that a person has the lawful right to do a thing irrespective of his motive for doing it, the proposition that an act lawful in itself is not converted by a bad motive into an unlawful act is a mere abstract truism. But if the meaning of the proposition is that when a person or an aggregation of persons, if influenced by one kind of motive, has a lawful right to do a thing, the act is still lawful when done with any motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, then the proposition is neither logically nor legally accurate.

In so far as a right is absolutely and unqualifiedly lawful, it is lawful whatever may be the motive of the actor; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and the motive combined. *Plant v. Woods*; 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 302. The intent or knowledge with which an act is done may make a lawful act unlawful. It is no offense to receive stolen goods; it is an offense to receive them knowing them to be stolen. The act of receiving the goods is identically the same in each instance. In the one case it is lawful, in the other the same act is unlawful because the scienter makes it so. To utter forged paper is no offense, but to utter it knowing it to be forged is criminal. It is the same act in each instance, but it is lawful or unlawful according to the absence or presence of a guilty knowledge. Hence it is fallacious to say that an act which is lawful can never become unlawful, and equally fallacious to say that, though it is lawful for a person to refuse to sell to another, it is also lawful for the same person in combination with others to likewise refuse to sell when such refusal forms part of a scheme to raise and maintain the price of commodities in restraint of trade, and is not the bona fide exercise of their right to refuse to sell.

The declaration goes a step farther and charges that the defendants coerced other vendors of drugs and druggists' supplies to abstain from selling those articles to the plaintiff, and that they did this by means of threats of blacklisting and boycotting such vendors if they should sell to the plaintiff whilst it was not a member of that combination, by reason of which threats those vendors were intimidated and were deterred from selling to the plaintiff. The plain meaning of all this is: The defendants notified the plaintiff that, unless it entered into the union or combination, and charged the same prices which other members thereof were required to charge, the defendants would by threats of coercion, by blacklisting, and by boycotting other dealers, deprive the plaintiff of the ability to carry on its lawful business. Is such an interference with the legal right of an individual to conduct a lawful business in a lawful way tolerated by the law? And can it be permitted to flourish unscathed because no open deeds of violence or breaches of the peace have been committed? It would be a reproach to the law if such were the case. A boycott means the confederation, generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. 8 Cyc. 639.

The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by law-

ful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment. *My Md. Lodge v. Adt*, 100 Md. 248, 59 Atl. 721, 68 L. R. A. 752. Whilst an owner of property has the legal right to refuse to sell it to another, and whilst, as in the case of *Bohn Manf. Co. v. N. W. Lumbermen Ass'n*, supra, several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages, and in fact may refuse to work unless such better wages are obtained, still "the law does not permit either an employer or employé to use force, violence, threats of force or threats of violence, intimidation, or coercion to secure these ends (*My Md. Lodge v. Adt*, supra); nor does it permit vendors to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their own method of conducting a lawful business in a lawful way. In *Erdman et al. v. Mitchell et al.*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783, it was held that a conspiracy by a number of persons that they will, by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union, would be restrained.

The case at bar involves no right of labor, but the principles which have upheld the jurisdiction of courts to intervene to prevent injury and loss that would result to both employer and employé, if a threatened strike or boycott were not prevented, are broad enough to include the situation presented by the declaration now before us. In the case of *Plant v. Woods*, supra, it was held that members of a labor union were entitled to an injunction restraining the members of another union, from which they had withdrawn, from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. * * *

If these facts warrant a court of equity in restraining anticipated injury, why do they not furnish a sufficient ground to enable a court of law to award damages for the injury which they have actually caused? The coercive threats of blacklisting and boycotting have been as efficacious in restraining the minds of the persons upon whom they operated according to the averments of the narr. as would have been the consummated boycott itself; and the result to the plaintiff's business has been just as disastrous as though the persons who have been deterred or terrorized by these threats from selling to it

had been in fact blacklisted by the defendants. The threat to boycott produced the consequences intended by the defendants as completely as an actual boycott would have done, and it is no answer for them to say that no other overt act, or no act involving a breach of the peace, was done to make effective their unlawful combination. The threatened boycott was successful. It deterred persons from selling to the plaintiff, and as a direct result ruined the plaintiff's business. These are the allegations of the narr., and, if proved to be true, they show an injury to the plaintiff as the direct consequence of the lawless acts of an unlawful confederation, and entitle the plaintiff to recover.

The threat to injure the business of the persons who might sell to the plaintiff was just as efficacious in preventing them from doing the thing they were warned not to do, and therefore just as potent in causing damage to the plaintiff, as an actual boycott would have been. A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent. And. Law Dic. That such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action, has repeatedly been decided. * * * The threats were overt acts in the scheme of the conspiracy, and were as effective in accomplishing the result intended to be attained as would have been an agency or instrument of physical force had it been resorted to.

The damages alleged to have followed the acts and conduct of the defendants are charged to be the direct and necessary results of those acts and that conduct. Every element, therefore, which is required to make out a valid cause of action is distinctly set forth in the narr., and the demurrer should have been overruled, unless there has been a misjoinder of defendants. It is insisted that the retail drug association should not have been made a party, but the answer to this objection is found in the narr. itself, since by appropriate averments it charges that defendant with a complicity in and as being the medium to execute the various illegal acts which go to make up the cause of action. * * *

Judgment reversed, with costs above and below, and new trial awarded.

OVERLAND PUB. CO. v. UNION LITHOGRAPH CO.

(District Court of Appeal, California, 1922. 207 Pac. 412.)

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it entered after general demurrers to the complaint had been sustained. The complaint asks for injunctive relief and for damages; its allegations are lengthy and complex. In substance, they are as follows:

Plaintiff is a corporation doing business under the laws of California. Certain named defendants and some 200 others, whose names are unknown to plaintiff, composed an organization known as the "Printers' Board of Trade." Said association is formed for the purpose, among others (as set forth in its by-laws) "to investigate and check injurious trade practices, and encourage the opposite" in the business of printing and publishing, which is the business carried on by the several members of the association. Certain of the named defendants, together with about 1,300 others whose names are unknown to plaintiff, composed an association known as "S. F. Typographical Union No. 21." Certain named defendants and 500 other persons whose names are unknown to plaintiff compose an association of persons engaged in the business of printing pressmen and assistants known as the "S. F. Printing Pressmen & Assistants Union No. 24." Certain named defendants, with numerous other persons whose names are unknown to plaintiff, compose an association of persons engaged in the printing trades in the city and county of San Francisco under the name of "Franklin Printing Trades Association." The executive officers of each of these associations are also joined as defendants.

The complaint continues with allegations, in effect, as follows: That on or about March 1, 1920, plaintiff was engaged in the city and county of San Francisco in carrying on and doing business as a printer and publisher in said city and county, and had invested in its business capital in excess of \$25,000, and had built up an established trade or employed on the average more than 25 persons in said business; that in the month of March, 1920, the said association known as "Printers' Board of Trade of San Francisco" caused an agent or representative of said association to approach the managing officers of plaintiff and to demand that plaintiff become a member of said board of trade; that plaintiff, for its own good reasons, declined to join said board of trade. On January 17, 1921, plaintiff received from said board of trade a written communication, signed by the secretary thereof, inviting plaintiff to become a member of said board of trade, and reciting that the monthly dues of members would amount to \$2, plus \$1 for each employee in plaintiff's composing room and press room. Plaintiff again advised the said board of trade that it did not desire to become a member thereof.

It is alleged that on November 23, 1920, a written agreement was entered into by and between the defendant association, "Franklin Printing Trades Association," and the association known as the "Printers' Board of Trade" (in said agreement referred to as the "Employers' Association") and the association known as the "S. F. Typographical Union No. 21." Said agreement is referred to as the "Typographical Agreement" and it is alleged that it provides, in paragraph fifth thereof, as follows:

"In order that the union may secure the adoption and carrying out by all commercial printing concerns within its jurisdiction of the scale

of wages and working conditions herein specified, and have the responsibility of the employers for their observance and performance, the union requests and the employers hereby agree that the employers will admit to membership in their association all reputable printing concerns; and in consideration hereof, and of the assumption of the responsibility by the employers for any and all violations of said scale of wages and working conditions by every member of the employers, the union agrees that its members will work only for such printing concerns as are members of the employers, provided that the employers shall not arbitrarily, or for any but good cause, refuse admission to or deny retention of membership in the Employers' Association."

The complaint sets forth that during the years 1919 and 1920, the representatives of the printers' board of trade sought to induce plaintiff to join said board of trade and threatened to enforce the provisions of said Typographical Agreement above set forth and compel the members of said unions who were working for plaintiff to leave such employment. Plaintiff was also visited by representatives of the unions involved, who stated that if plaintiff did not join the association known as Printers' Board of Trade of San Francisco, the said two union associations would be compelled and would, in pursuance of paragraph 5 of said Typographical Agreement, order the withdrawal from the employ of plaintiff of all members of said two union associations. Plaintiff refused to join the printers' board of trade and the union employees left plaintiff's employ.

It is alleged that if plaintiff persists in its refusal to become a member of the printers' board of trade, the persons alleged to have quitted its employ will "refuse to resume work and refuse to longer continue in the employ of plaintiff"; "that without the co-operation of the afore-said quitting members of said S. F. Typographical Union No. 21, it will be impossible, within a period of three or four days, for plaintiff to continue its printing and publishing operations." It is then alleged that plaintiff has on hand important large contracts for printing and is under written contract to publish certain magazines and periodicals and that time is of the essence of such contracts, and that by reason of the acts and things charged against the defendants, plaintiff will be prevented from carrying out said contracts, and will become liable in damages thereon.

There are also allegations to the effect that the unions involved here are members of the American Federation of Labor Unions, which controls a magazine with a wide circulation among its members and affords "a ready, convenient, powerful and effective vehicle for the dissemination of information as to persons, products and manufacturers boycotted or to be boycotted"; that "if the defendants * * * continue in the course which they have consummated and threatened of boycotting this plaintiff and advising others to boycott plaintiff, it will result in the very great injury of plaintiff."

We shall pause here in our enumeration of the allegations of the complaint so as to consider the effect of those already set forth. The Typographical Agreement, in so far as it is set forth in the complaint, is one which is perfectly legal and involves no restraint of trade. Provisions substantially the same as those pleaded herein were considered in the case of *People v. Epstein*, 102 Misc. Rep. 476, 170 N. Y. Supp. 68, 70. The agreement in that case was between the Photo-Engravers' Board of Trade of New York and members of a Photo-Engravers' Union. The reasoning of the court in that case is applicable in considering the portion of the Typographical Agreement before this court in the present case. The so-called Cartwright Act (Stats. 1907, p. 984, as amended by Stats. 1909, p. 594), upon which plaintiff relies in bringing this action, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of this act. The portion of the Typographical Agreement pleaded by plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class.

It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. *Parkinson v. Bldg. Trades*, 154 Cal. 581, 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 75, 103 Pac. 324. These rights may be exercised in association with others so long as they have no unlawful object in view. *Parkinson v. Building Trades*, supra, 154 Cal. at page 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. Thus, where building contractors and a group of workmen made an agreement which restricted the opportunities of a contractor not a party thereto, it was said that, though the business of the third party was interfered with, the courts could give no relief, since "the law could only make it possible for the complainant to do business in the way it chooses by compelling the defendants to do business in the way they did not choose. * * * When equal rights clash, the law cannot interfere." *National Fireproofing Co. v. Masons Bldrs. Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In the case of *Pierce v. Stablemen's Union*, 156 Cal. 75, 103 Pac. 327, it was said:

"We think that to-day no court would question the right of an organized union of employees, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a 'strike.' We think, moreover, that no court questions the right of those men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the primary boycott."

"The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not

enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. * * * A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*." *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 265, 94 C. C. A. 535, 541 (26 L. R. A. [N. S.] 148).

"An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." *Bossert v. Dhuy*, 221 N. Y. 342, 359, 117 N. E. 582, 585 (Ann. Cas. 1918D, 661).

In this state, the doctrine has been announced even more broadly. In the case of *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. at p. 599, 98 Pac. 1034, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, it is said:

"In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strikers—their acts being entirely lawful, their motives would be held immaterial."

In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

But the complaint continues, in another section thereof, with allegations concerning the practices of the printers' board of trade. There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the printers' board of trade. The latter are made upon information and belief, and are substantially as follows: That said board now is and for more than three years last past has been engaged in "a combined scheme and effort to violate the laws of the state of California and of the United States of America in such case made and provided, by causing the prices of articles and

services made and furnished by various members of the said Printers' Board of Trade of San Francisco, to be fixed grossly in excess of an amount that would yield to the persons making the charge and collecting said prices, a fair and reasonable profit"; that in pursuance of said scheme and effort various members composing the said printers' board of trade meet daily in the office of the said printers' board of trade in the city and county of San Francisco, and said board of trade requires that all of the new contracts and proposals for business involving an amount in excess of \$15, then under submission to members of said Printers' Board of Trade of San Francisco, be reported and submitted at such meetings, and that, thereupon, by lot or agreement tentative prices are fixed upon said new contracts and it is likewise determined which member of the printers' board of trade shall perform the services or furnish the materials contemplated by such proposals or contracts; that thereupon all of the members other than the member so decided upon refrain from bidding for the doing of said work or the furnishing of said material except in an amount above the amount so fixed. It is alleged that by reason of these facts a person seeking to have work done or materials furnished is compelled to pay the price fixed as aforesaid by said members of said printers' board of trade; that said price so fixed is arrived at through corrupt, unjust, and illegal methods as aforesaid, practiced by said Printers' Board of Trade of San Francisco, and the person desiring the work or materials believes that the price so fixed is obtained as a result of competitive bidding; that as the result of said unjust and illegal practices aforesaid, competition *between the members* of said Printers' Board of Trade of San Francisco (which Board embraces practically 95 per cent. of the concerns engaged in the printing trade in the city and county of San Francisco) is destroyed and rendered impossible and that said acts constitute an unjust, discriminating and unlawful restraint upon trade and commerce, both intrastate and interstate.

Appellant contends that these allegations, if proven, constitute the Printers' Board of Trade a trust within the meaning of the so-called Cartwright Act. Act 4166, General Laws of California (1915) Deering; Stats. 1907, p. 984, as amended by Stats. 1909, p. 594. Conceding, for the purposes of this opinion that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the Attorney General or the district attorney. Section 2, Stats. 1907, p. 984. But this is not such a proceeding. This is an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by "any person who shall be *injured in his business or property* by any other person or corporation * * * by reason of anything forbidden" in said act.

In the present case the plaintiff makes no allegations of any such injury or damage. The general allegation of its complaint: "That by

means of each and all of said acts done and threatened by the defendants aforesaid, respectively, as hereinbefore set forth, the trade and commerce of the plaintiff with its patrons and customers * * * has been and will continue to be forcibly suspended, and unless the relief hereinafter prayed shall be granted * * * plaintiff will lose valuable copyrights because of its inability to continue its usual operations; and that plaintiff by reason of the premises has suffered, and will suffer in an increasing degree, damages * * * in excess of \$75,000"—is insufficient. There is no allegation of the particulars in which the plaintiff has been or will be damaged by the restraint of competition among the members of the printers' board of trade. The only damage to plaintiff which is alleged i. e., the loss of contracts, copyrights, etc., arises from the alleged inability of plaintiff to continue its operations, due to the fact that it cannot secure union labor. This matter we have disposed of in the first part of this opinion. We consider it *damnum absque injuria*. There is no allegation of loss to plaintiff arising because of the alleged practices of the printers' board of trade in restricting competition *among its own members*. On the contrary, it is perfectly apparent that plaintiff's business could not be injured by such practice, but must be benefited thereby. If, as plaintiff alleges, 95 per cent. of the persons engaged in the printing business voluntarily form an association and restrain themselves from competing with one another, plaintiff, being free from such restraint, has the fewer competitors with whom to contend. Indeed, plaintiff does not complain of loss or damage because of the want of competition among the members of the printers' board of trade, of which plaintiff is not a member. If plaintiff could secure union labor and continue to operate its business, the activities of the printers' board of trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. It is the withdrawal of the union labor and the consequent inability of plaintiff to operate its business in competition with the members of the printers' board of trade which is its real complaint.

Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damages to his business or property by reason thereof. There are no facts alleged in the complaint showing damage to plaintiff because of said defendant's methods of doing business.

In the case of *Munter v. Eastman Kodak Co.*, 28 Cal. App. 664, 153 Pac. 739, it is said: "While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action for

damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in *Krigbaum v. Sbarbaro*, 23 Cal. App. 427, 433 [138 Pac. 364]: "To be 'injured in business or property' within the contemplation of said law, as we understand it, is where the injury has directly resulted from the fact of the existence of the trust—that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.'"

Furthermore, the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. Section 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See, also, *Natl. Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

The demurrers were properly sustained; the judgment is affirmed. We concur: NOURSE, J.; STURTEVANT, J.⁷

⁷ Hearing denied by the Supreme Court of California June 15, 1922.

CHAPTER IV

RIGHTS AND LIABILITIES UNDER FEDERAL STATUTES

 CONNOLLY v. UNION SEWER PIPE CO. *creditor*

(Supreme Court of the United States, 1902. 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.)

Mr. Justice HARLAN delivered the opinion of the court.¹

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the circuit court of the United States for the northern district of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15th, 1894, the other dated January 15th, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The pipe company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for \$2,389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

Each of the defendants filed a plea of the general issue, with notice of special defenses and of set-off.

The special defenses in each case were substantially the same. The notice in the Connolly Case was that the defendant on the trial of the action would rely on [the plaintiff being an unlawful combination in restraint of trade (1) at common law; (2) under the Sherman Act; and (3) under the Illinois Anti-Trust Act of June 20, 1893].

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the Act of Congress of July 2, 1890, c. 647, known as the Sherman Anti-Trust Act, \$56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1, 1893, \$17,323.48; and for money had and received by plaintiff of defendant contrary to law, \$17,323.48.

The set-offs claimed by Dee were of like character, but of larger amounts.

Both cases were, by agreement, submitted to the same jury, and

¹ The statement of facts has been abridged and some quotations from cases are omitted.

were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defenses, but leave was denied.

The Circuit Court disallowed both the first and second of the above special defenses, and in respect of the third its decision was that the Illinois trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case; in the Connolly Case, for the amount of the two notes sued on; in the Dee Case, for the amount of the plaintiff's open accounts against him. * * * Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations, and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade, and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

This defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe [citing *Strait v. National Harrow Co.*, 51 Fed. 819; * * * *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864; *Dennehy v. McNulta*, 41 L. R. A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825].

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it, as in *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. Ed. 172, 177, 9 Sup. Ct. Rep. 776; * * * *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; * * * *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. * * *

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal

combination; for the contracts between the defendants and the plaintiff could have been proved without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defense, based alone upon the principles of the common law, was properly overruled.

The special defense based upon the act of Congress of July 2d, 1890, c. 647, 26 Stat. 209, was also properly rejected. * * *

Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed. 802, which was a libel in rem by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered up-

on the ground that the tug owners were members of an association which was illegal and void under the Sherman Act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. * * * An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market value because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman Act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robison v. Hibbs*, 48 Ill. 408, 409, 410; *Hawks v. Lands*, 8 Ill. 227, 232; *Hubbard v. Rogers*, 64 Ill. 434, 437; *Evans v. Hughey*, 76 Ill. 115, 120; *Clause v. Bullock Printing Press Co.*, 118 Ill. 612, 617, 9 N. E. 201; *Dushane v. Benedict*, 120 U. S. 630, 648, 30 L. Ed. 810, 814, 7 Sup. Ct. Rep. 696. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.²

² The remainder of the case concerning the constitutionality of the Illinois Anti-Trust Act is omitted.

CONTINENTAL WALL PAPER CO. v. LOUIS VOIGHT & SONS CO.

(Supreme Court of United States, 1909. 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Ohio, dismissing a suit to recover a balance on an account for goods sold and delivered in the execution of a monopolistic agreement.

See same case below, 78 C. C. A. 567, 148 Fed. 939.

Mr. Justice HARLAN.³ The defendant contends that, under the facts admitted by the demurrer, it must be taken that the Continental Wall Paper Company is the representative in this suit of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several states in the manufacturing, buying, selling, and dealing in wall paper; that this combination has the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other states, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with, and for the object of enforcing, the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company; that a judgment against the defendant upon the account in suit will, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime; consequently, that the petition, upon the facts admitted, was properly dismissed.

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly to restrain as well as monopolize trade and commerce among the several states and with foreign nations as involved in the manufacture, sale, and transportation of wall paper among the several states and with foreign nations. This part of the case is forcibly presented by the circuit court of appeals, which, in its opinion, delivered by Judge Lurton, well said: "The conspiring mills were situated in many states. The consumers [of wall paper] embraced

³ The statement of facts is omitted.

the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more wide-spread in its operation, and more evil in its purposes. It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act." 78 C. C. A. 567, 575, 148 Fed. 939, 947.

But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 46 L. Ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.⁴

The present case is plainly distinguishable from the *Connolly Case*. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned*. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the *Connolly Case* was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could

⁴ A review of this case is omitted in part.

not be sustained, either upon the principles of the common law or under the anti-trust act of Congress.

The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly Case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly Case.

The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not

lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.⁵

The adjudged cases all hold that, upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction, so as to ascertain its real nature. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. Ed. 136, 149, 20 Sup. Ct. 96, 109, the court said that "all the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination represented by the plaintiff in this case was illegal under the Anti-Trust Act of 1890; that it is to be taken as one intended, and which will have the effect, directly to restrain and monopolize trade and commerce among the several states and with foreign states; and that the plaintiff cannot have a judgment for the amount of the account sued on, because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination. We consequently hold that the circuit court of appeals properly sustained the third defense, and rightly dismissed the suit. Its judgment must be affirmed.

It is so ordered.⁶

⁵ An extended review of case is omitted.

⁶ The dissenting opinions of Mr. Justice Holmes and Mr. Justice Brewer are omitted. Mr. Justice White and Mr. Justice Peckham also dissented.

FLEITMANN v. WELSBACH STREET LIGHTING CO.

(Supreme Court of the United States, 1916. 240 U. S. 27, 36 Sup. Ct. 233, 60 L. Ed. 505.)

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill by a stockholder of the Consolidated Street Lighting Company, against that company and a number of other corporations and individuals, to compel the defendants other than his own company to pay to the latter threefold damages under the Sherman Act. Act July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, Comp. St. 1913, §§ 8820, 8829. According to the allegations the other defendants conspired to control the business of municipal lighting, etc., throughout the United States, and in pursuance of their conspiracy procured their agent to purchase from the former owners a majority of the stock in the plaintiff's company, and then proceeded to ruin it and drive it out of business by misconducting its affairs. The plaintiff has demanded of his company and its officers to institute proceedings, but they have refused. The bill was dismissed by the District Court on motion of the appellees in the two appeals before this court, and the decree was affirmed by the Circuit Court of Appeals. 128 C. C. A. 31, 211 Fed. 103.

The bill alleges in terms that it is brought to recover threefold the damages alleged; a decree for such damages was the decree prayed. The only specific error assigned on appeal to the Circuit Court of Appeals was holding that such a suit in equity could not be maintained by a single stockholder; that was the only question dealt with by the district court, and that was the ground of decision in the Circuit Court of Appeals. It really is the only question in the case.

Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue,—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged.

No doubt there are cases in which the nature of the right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376. Even the Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, passed since this

suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss.

It now is suggested, evidently as an afterthought since the decision in the District Court, that there might be a decree directing the corporation to sue, or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held.

Decree affirmed.

Mr. Justice McKENNA and Mr. Justice PITNEY dissent.

UNITED COPPER SECURITIES CO. v. AMALGAMATED
COPPER CO.

(Supreme Court of the United States, 1917. 244 U. S. 261, 37 Sup. Ct. 509, 61 L. Ed. 1119.)

Mr. Justice BRANDEIS delivered the opinion of the court.

This is an action at law. The complaint alleges that plaintiffs are the holders of more than 200 of the 500,000 shares of the outstanding stock of the defendant United Copper Company, a New Jersey corporation; that the defendants other than that company have by conduct violating the Sherman Law (Act of July 2, 1890, c. 647, 26 Stat. 209, Comp. Stat. 1916, § 8820) injured it to the extent of more than \$5,000,000;⁷ and that:

"IV. In or about the month of January, 1912, and before the commencement of this action, the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation defendant, and said corporation defendant and its board of directors have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

"V. This action is commenced and prosecuted by the plaintiff United Copper Securities Company, and by the plaintiff Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company."

The complaint concludes:

"Wherefore, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may

⁷ "The bill is framed on the theory that the injury to the United Copper Company was suffered directly, as a competitor of the other defendants, and the case will be discussed on that supposition. It is proper to observe, however, that the allegations of the bill are ambiguous in this respect, and that the United Copper Company appears to have been a mere holding company, which suffered injury only indirectly as controlling stockholder in various mining companies alleged to have been damaged by the conspiracy, and which were not made parties to this suit." Per Mr. Justice Brandeis in the margin of his opinion.

join with them in the prosecution of this action in the sum of threefold damages under § 7 of the act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sustained by the United Copper Company, as hereinbefore alleged."

The District Court sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the Circuit Court of Appeals (L. R. A. 1917E, 1004, 139 C. C. A. 15, 223 Fed. 421), and the case comes here on writ of error. A motion for substitution of plaintiffs, hereafter referred to, was made in this court and argued with the merits.

There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question: Whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act may sue at law to recover such damages in the right of the corporation if, after request, it refuses to institute the suit itself? Insurmountable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure.

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery [citing cases]. In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers, or that its directors stand in any relations to them, or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body, or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.

But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 454, 26 L. Ed. 827, 829; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624, 7 Sup. Ct. 520. The latter case was an equity suit by a stockholder to enforce a purely legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit. The particular equitable relief sought in *Fleitmann v. Welsbach Street Lighting Co.*, 240 U. S. 27, 60 L. Ed. 505, 36 Sup. Ct. 233, was denied; but this denial affords no reason for assuming that the long-settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman Law.

This action was commenced May 3, 1912. The judgment dismissing the complaint was rendered in the District Court September 24, 1914, and affirmed by the Circuit Court of Appeals April 13, 1915. The case was entered in this court July 27, 1915. On April 7, 1917, about a fortnight before the case was reached for argument, George D. Hendrickson and Luther Martin, Jr., filed in this court a motion that they be substituted as plaintiffs in error. The motion recites that they had, on March 1, 1917, been appointed receivers of the United Copper Company by the Court of Chancery of New Jersey, and had on April 2, 1917, been authorized by it to apply for such substitution. Annexed to the motion is a copy of the petition for appointment of the receivers which alleges that the United Copper Company had on February 28, 1912, been dissolved by proclamation of the Governor of New Jersey for failure to pay franchise taxes; and that it had assets of large value; but that its directors named (who, under the statute, thereupon became trustees for the corporation) had taken no steps whatever to collect its assets or settle its affairs and were not fit and proper persons to be intrusted with them. Only by opposing affidavits, filed by defendants, was it disclosed that, on February 10, 1913, more than four years previously, the District Court of the United States for the Southern District of New York had appointed other receivers of the United Copper Company, and had vested in those receivers the possession of "all the properties owned by the said defendant [the United Copper Company] or in which the said defendant has any ownership or interest, whether such property be real, personal, or mixed, of whatsoever kind and description, and wheresoever situated, including * * * things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in the said bill of complaint, and all shares of stock, certificates of equitable interest, and other certificates representing any interest in any property, and all other securities of whatsoever char-

acter owned by the defendant company or in which it has any interest or which it controls directly or indirectly," and that on February 14, 1913, the same persons had been appointed ancillary receivers by the United States District Court for the District of New Jersey. We have no occasion to consider the power of this court to grant the motion for substitution. See *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 81, 25 L. Ed. 550. It is without merit and is denied.

Judgment affirmed.

PAINE LUMBER CO. v. NEAL.

(Supreme Court of the United States, 1917. 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256.)

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill in equity brought by corporations, of states other than New York, engaged in the manufacture of doors, sash, etc., in open shops, against officers and agents of the United Brotherhood of Carpenters and Joiners of America and of the New York branch of the same, certain union manufacturers of doors, sash, etc., members of the Manufacturing Woodworkers' Association, and many master carpenters, members of the Master Carpenters' Association, whose business is to install such products in buildings. The bill was dismissed by the District Court (212 Fed. 259), and the decree was affirmed by the Circuit Court of Appeals (130 C. C. A. 522, 214 Fed. 82).

The bill alleges a conspiracy of the members of the Brotherhood and the New York branch to prevent the exercise of the trade of carpenters by any one not a member of the Brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the state where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the Master Carpenters, coerced by the practical necessities of the case, made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lockouts. This agreement provides that "there shall be no restriction against the use of any manufactured material except nonunion or prison-made;" the arbitration plan is confined to shops that use union labor, and the employers agree to employ union labor only. The unions will not erect material made by nonunion mechanics. Another agreement between the Manufacturing Woodworkers' Association, the Brotherhood, and the New York branch, also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install nonunion or prison-made material," and the Woodworkers undertake that members of the Brotherhood shall "be employed exclusively in the mills of the Manufacturing

Woodworkers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the Brotherhood, and that, owing to their refusal to work with nonunion men, and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that, owing to the above provisions as to nonunion material, the sale of the plaintiffs' goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "a nation-wide unionization in their trade."

An injunction is asked against the defendants (other than the Master Carpenters) conspiring to refuse to work upon material made by the plaintiff, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the Brotherhood. It is prayed further that the provision quoted above from the Master Carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the injunction was refused by the district court was that, although it appeared that the agreements above mentioned were parts of a comprehensive plan to restrain commerce among the states, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The Circuit Court of Appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court, if the facts show any violation of the Act of July 2, 1890, c. 647, 26 Stat. 209, Comp. Stat. 1916, § 8820, a private person cannot maintain a suit for an injunction under section 4 of the same (*Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 71, 48 L. Ed. 870, 880, 881, 24 Sup. Ct. 598), and especially such an injunction as is sought, even if we should go behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side because, while the Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o, establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 369. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building, since the more successful it is the more competitors are introduced into the trade. Cases like *Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47, concerning conspiracies between railroads and elevator companies to prevent competition, seem to us very clearly not to have been intended to overrule the authority that we cite, and not to have any bearing on the present point.

Decree affirmed.

Mr. Justice PITNEY, dissenting.⁸

Appellants, who were complainants below, filed their bill in the United States Circuit Court (afterwards District Court) in the month of February, 1911, to obtain an injunction against the prosecution of a conspiracy to restrain interstate trade and commerce in the products of complainants' woodworking mills, and destroy their interstate business by means of a boycott. The Federal jurisdiction was invoked both on the ground of diverse citizenship and on the ground that the action arose under the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, Comp. Stat. 1916, § 8820. Upon the merits, the laws of the state of New York were relied upon, as well as the federal act. General Business Law of New York, § 340; Penal Law of New York, § 580, subd. 6. * * *

I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights, and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the courts of the United States. I think complainants were entitled to an injunction also upon grounds of state law; but will confine what I have to say to the federal question.

The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate commerce prohibited by and actionable under the Sherman Law, on the authority of *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 44-48, 48 L. Ed. 608, 611-613, 24 Sup. Ct. 307; *Loewe v. Lawlor*, 208 U. S. 274, 292, et seq., 52 L. Ed. 488, 496, 28 Sup. Ct. 301, 13 Ann. Cas. 815; *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U. S. 600,

⁸ A part of the dissenting opinion is omitted.

614, 58 L. Ed. 1490, 1500, L. R. A. 1915A, 788, 34 Sup. Ct. 951; *Lawlor v. Loewe*, 235 U. S. 522, 534, 59 L. Ed. 341, 348, 35 Sup. Ct. 170. The proof is clear also that the conspiracy is aimed at the property rights of complainants in particular; certainly that it is designed to injure directly and drive out of business a limited class of traders—the so-called “nonunion” wood-working mills—to which complainants belong; that complainants are sustaining direct and serious injury through the closing of the channels of interstate trade to their products—an injury quite different from that suffered by the public in general; and that it is a continuing injury not adequately remediable by the ordinary action at law or the action for treble damages under the Sherman Act, and hence is an irreparable injury in the sight of equity. That there is no particular animosity towards complainants as individuals—assuming it to be true—is, in my view, a matter of no consequence. If evidence of malice be necessary (and I do not think it is), this is only in the sense that malice consists in the intentional doing of an unlawful act, to the direct damage of another, without just cause or excuse. *Brennan v. United Hatters*, 73 N. J. L. 729, 744, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698.

Free access to the markets through unobstructed channels of commerce is the very breath of the life of such manufacturing establishments; and to say that complainants are not specially injured by the conduct of defendants seems to me to require that the eyes be closed to the evidence in the case and to the familiar facts of commerce. I do not understand either of the courts below to have held as matter of fact that complainants were not specially injured; but that the District Court (212 Fed. 267), while finding in fact that complainants were directly injured, reasoned (erroneously, as I think) that it was not such special injury as was contemplated by certain New York decisions cited.

Section 1 of the Sherman Act declares that every combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal, and imposes a punishment of fine or imprisonment upon the guilty parties. It clearly recognizes, what is well known, that injury to other traders and competitors is the primary effect of such a combination. A right of action for damages by a party specially aggrieved would have followed by implication (*Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 39, 60 L. Ed. 874, 877, 36 Sup. Ct. 482); and it was doubtless because treble damages were to be allowed that an express authorization of suit at law was included in the act. Section 7.

The fourth section provides: “The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts,

under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations," etc. The act was designed to be highly remedial, so far as *preventing* restraints of trade and commerce is concerned, and the semicolon in the sentence just quoted indicates, as I think, that the grant of jurisdiction was intended to be general, and that the following clause was intended to impose a special duty upon the district attorneys to resort to that jurisdiction whenever, in the discretion of the Attorney General, a public prosecution should seem to be called for.

Nor is the omission of an express declaration that persons threatened with special injury through violations of the act may have relief by injunction, of particular significance. Declarations of that character are rarely met within the legislation of Congress. [Section 16 of the so-called Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o, contains such a provision; but this was inserted only because some of the federal courts had held—erroneously, as I think—that private parties could have no relief by injunction against threatened violations of the Sherman Act. These decisions will be discussed below.] The reason is not far to seek. By section 2 of article 3 of the Constitution, the judicial power is made to extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States," etc. This had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate. The federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective states, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England. *Robinson v. Campbell*, 3 Wheat. 212, 221, 223, 4 L. Ed. 372, 375, 376; *United States v. Howland*, 4 Wheat. 108, 115, 4 L. Ed. 526, 528; *Irvine v. Marshall*, 20 How. 558, 565, 15 L. Ed. 994, 998. In *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 339, 50 L. Ed. 499, 506, 26 Sup. Ct. 282, the court, by Mr. Justice Brewer, declared: "It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases."

To speak accurately, it is not the statute that gives a right to relief in equity, but the fact that in the particular case the threatening effects of a continuing violation of the statute are such as only equitable process can prevent. The right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but upon the consequences that will flow from its violation. As the court, by Mr. Justice Field, declared in *Holland v. Challen*, 110

U. S. 15, 25, 28 L. Ed. 52, 56, 3 Sup. Ct. 495: "If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved." * * *

The fact that the threatened invasion of plaintiff's rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party. In re Debs, 158 U. S. 564, 593, 39 L. Ed. 1092, 1105, 15 Sup. Ct. 900.

I find nothing in the letter or policy of the Sherman Act to exclude the application of the ordinary principles of equity, recognized in the constitutional grant of jurisdiction. Applying them to the facts of the present case, appellants are entitled to an injunction to restrain the threatened, continuing, and irreparable injury and damage that otherwise will result from defendants' violation of the act.

The special duty imposed upon the Attorney General and the district attorneys is not inconsistent with this view. The field to be covered by such public prosecutions, and the objects sought thereby, are quite different from the scope and effect of an injunction granted to a private party threatened with special and irreparable injury to his property rights through a violation of the act. The proceeding by the district attorney is a kind of equitable quo warranto, calculated to bring the entire combination to an end, whether it be in the form of a corporation or otherwise. But there may be and are cases of direct and irreparable injury to private parties resulting from violations of the act, not capable of being redressed through actions at law under section 7; and justice to the parties aggrieved requires that the act be construed, if the language admits of such a construction (and I think it does), so as to allow an injunction to prevent irreparable injury to a private party, otherwise remediless, without going to the extent of dissolving the combination altogether, which in some cases might not be a matter of public interests or importance. Unless so construed, the act must operate in many instances to deprive parties of a right of injunction that they would have had without it. So far, at least, as boycotting combinations are concerned—and this case is of that character—the act creates no new offense and gives no new right of action. *Temperton v. Russell*, [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676; *Quinn v. Leatham*, [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 112-121, 30 Atl. 881; *George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n*, 77 N. J. Eq. 219, 225, 41 L. R. A. (N. S.) 445, 79 Atl. 262.

I find no controlling decision in this court [reviewing *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71, 48 L. Ed. 870, 881, 24 Sup. Ct. 598; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 174, 175, 59 L. Ed. 520, 525, 526, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118].

The question whether private parties threatened with injury through violations of the Sherman Act might (prior to the Clayton Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o) have relief by injunction is one upon which the lower federal courts are not in accord. * * *

Moreover, so far as these cases have held that private parties could have no injunction for a violation of the Sherman Act (some of them have not so held), the real ground of decision in *Blindell v. Hagan* was misunderstood. In that case the jurisdiction of the federal court was invoked upon the ground of alienage of complainants, defendants being citizens of the state of Louisiana, and, also upon the ground that defendants were engaged in a combination in restraint of trade between New Orleans and Liverpool, contrary to the prohibition of the Sherman Act. The circuit court, in declining to allow an injunction under the act, said: "This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it." Evidently this was intended to be confined to the question of an express authorization of an injunction for a mere violation of the act, for the court proceeded to grant preventive relief on the ground that there was jurisdiction because of the citizenship of the parties, and that under the ordinary equity jurisdiction an injunction should issue because of the threatened irreparable injury and the inadequacy of pecuniary compensation, and in order to prevent a multiplicity of suits. Upon appeal the decree was affirmed, upon the grounds expressed by the court below. 6 C. C. A. 86, 13 U. S. App. 354, 56 Fed. 696. * * *

Aside from the rights under the Act of 1890 [26 Stat. 209, c. 647, Comp. Stat. 1916, § 8820], I think appellants are now entitled to an injunction under section 16 of the Clayton Act—the case clearly being within the terms of the section—notwithstanding the act took effect after the final decree in the District Court. In an equity suit for injunction the reviewing court should decide the case according to the law as it exists at the time of its decision. This is not giving a retrospective effect to the new statute, for the relief granted operates only in futuro. * * *

Mr. Justice McKENNA and Mr. Justice VAN DEVANTER concur in this dissent.

Mr. Justice McREYNOLDS also dissents.

GENERAL INV. CO. v. LAKE SHORE & M. S. RY. CO.

(Circuit Court of Appeals of the United States, 1920. 269 Fed. 235.)

DENISON, Circuit Judge. The General Investment Company filed a bill to enjoin the consolidation of the Lake Shore and the New York Central Railroads. The District Court dismissed the bill, because jurisdiction was not acquired over the New York Central, and that was thought essential to the object of the suit. On appeal to this court, we affirmed the conclusion as to the lack of jurisdiction over the New York Central; but we thought that some of the relief prayed might, in a proper case, be granted against the Lake Shore alone, and that, to that extent, the New York Central was not an indispensable party. Accordingly, we reversed the dismissal and sent the case back for further proceedings in accordance with the opinion. This is reported in 250 Fed. 160, 162 C. C. A. 296, and to that opinion we refer for a fuller statement of the essential facts.

After the remand, the bill of complaint was amended, so as to show that plaintiff's purchase of its five shares of stock in the Lake Shore was not, in fact, made until after the directors' consolidation agreement had been executed. Thereupon the defendant filed a further motion, in which it asked: (1) That the bill of complaint be dismissed, in so far as it was founded upon the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830), and this for the reason that a private individual could not maintain such a bill; (2) that it be dismissed in so far as it was founded on the Clayton Act (38 Stat. 730), and this for the reason that the state court, in which the suit was commenced, had no jurisdiction of a case founded on the Clayton Act; (3) that in so far as it was founded on the Constitutions or statutes of the several states it be dismissed because it did not state a good cause of action. The motion to dismiss was granted, and plaintiff appeals.

1. *The Anti-Trust Act* (Act July 2, 1890).—The decision in *Paine Lumber Co. v. Neal*, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256, is clearly decisive and justifies the dismissal of this branch of the bill, unless the case may be distinguished from that, because this suit is by a stockholder and that was by a stranger. It is not correct to say that the court there decided only that such a suit could not be maintained under section 4 of the act (Comp. St. § 8823), though that happened to be the language used; that case was not brought under section 4, and the plaintiff made no claim of any right given by that section; the decision was that that suit could not be maintained; and the reference to "under section 4" must have been intended to express the thought that, under the effect of section 4 upon the whole act, the suit would not lie. It is now said that the effect of the Anti-Trust Act is to make a prohibited consolidation ultra vires of the corporation; that equity always had jurisdiction of a suit by a stockholder to enjoin his corporation from an ultra vires act; and hence that in such

a suit as this the court of equity does not depend for its jurisdiction on the Anti-Trust Act, and the case is not one "under the act."

We are unable to see any distinction in principle, in this respect, between a stockholder's case and the Paine Case. A stranger who was about to suffer irreparable loss from unlawful acts of another had the right to proceed in equity for an injunction against that stranger, just as much as a stockholder did against his corporation. The jurisdiction of equity does not depend on the Anti-Trust Act in the suit by the stranger any more than it does in the suit by the stockholder; in each case alike, the only important effect of that statute is to make unlawful the act sought to be enjoined. The present case is brought "under the anti-trust laws" no more and no less than was the Paine Case. It is to be noticed that, in the dissenting opinion in that case, the stockholders' cases, which had permitted the enforcement by injunction of rights dependent on the act, were approved; but the majority does not suggest that they are distinguishable, and we think that the effect of the majority opinion is to overrule them. The theory of the decision we think must be that the Anti-Trust Act declared certain rights and duties, that it intended there should arise therefrom only two remedies, a public one and a private one, each as specified, and that no other private remedy should depend thereon. *Wilder Co. v. Corn Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. It seems clear enough that the point as to which Mr. Justice Holmes said he was in the minority was as to the effect of the Clayton Act upon the right to an injunction against a labor boycott. *Duplex Co. v. Deering* (C. C. A. 2) 252 Fed. 722, 743, 747, 164 C. C. A. 562. Holding this view of the Paine decision, it follows that the court below was right in dismissing so much of this bill as was based on the Sherman Anti-Trust Act.

2. *The Clayton Act* (Act Oct. 15, 1914).—Section 16 of this act (8835o, U. S. C. S.) provides that "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the anti-trust laws." The effect of this section undoubtedly is to permit maintenance under the Sherman Anti-Trust Act of that class of suits, the right to maintain which had been denied in the Paine Case; but since the present case was commenced in a state court, and was by defendant removed to the court below, we must inquire whether this section authorized the state courts to act, and, if not, then whether the removal to the federal court makes any difference.

The grant of jurisdiction is to the "courts of the United States." This language has been expressly held not to reach even territorial courts, although they were created by the laws of the United States. *McAllister v. U. S.*, 141 U. S. 174, 179, 11 Sup. Ct. 949, 35 L. Ed. 693. Much less can it reach those courts which are wholly of another jurisdiction. It is true there are cases where this term has been

thought to reach some of the courts of the District of Columbia (see *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268; *United States v. Mills*, 11 App. D. C. 500, 504); but that was because the language and purpose of the act in question were especially appropriate to be so extended. In the present case the statute was dealing solely with a subject-matter of exclusively federal jurisdiction, interstate commerce, and while Congress might have intrusted some of its exercise to the state courts, there is no reason to presume such an intention; the natural presumption is rather to the contrary. Not only had the ordinary meaning of the phrase "courts of the United States" become fixed by familiar judicial construction long before the Clayton Act was passed, but it had been customarily used by Congress with the same definite meaning; for example, section 256 of the Judicial Code (Comp. St. § 1233) refers to the "courts of the United States" and the "courts of the several states" as different classes, exclusive of each other. Further, this section pertains only to the remedy, and there would be a strong presumption that a federal remedial statute did not relate to the remedies of another jurisdiction. From these considerations we are satisfied that a suit brought in a state court can get no help from section 16.

When the case was commenced, the state court either had or had not power to give relief because of the federal anti-trust laws. If it had not, we do not comprehend how jurisdiction of the subject-matter could have been conferred by the removal to the federal court. The jurisdictional objection was not as to the person; but as to the subject-matter. In *De Lima v. Bidwell*, 182 U. S. 1, 174, 21 Sup. Ct. 743, 45 L. Ed. 1041, it was said that defendant neither gains nor loses by the removal, that the case proceeds as if no such removal had taken place, and that the defendant unquestionably has the right, in the federal court, to show that the state court had no jurisdiction. While these statements were made with reference to a different situation from that here existing, we see no reason to doubt their present applicability. It follows that the court below, like the state court, had no jurisdiction of the remedy given by section 16 of the Clayton Act, and could not grant any relief upon that theory.⁹ * * *

The decree below should be affirmed; but, as we rest the affirmance in part upon an insufficiency of pleading, as to the state Constitutions and statutes and the damages,¹⁰ the affirmance will be without prejudice to the filing in a proper court of a new bill, based upon those Constitutions and laws only.

⁹ "The status of the present controversy" in its relation to the Sherman and Clayton Acts was considered by the Appellate Division, New York, and a suit like this one was dismissed. *Venner v. New York Cent.*, 177 App. Div. 296, 164 N. Y. Supp. 626, affirmed 226 N. Y. 583, 123 N. E. 893, certiorari refused 249 U. S. 617, 39 Sup. Ct. 391, 63 L. Ed. 803." *The Federal Reporter*.

¹⁰ So much of the opinion as holds that the bill did not sufficiently plead a violation of state law and as relates to the question of damages is omitted.

UNITED MINE WORKERS OF AMERICA v. CORONADO
COAL CO.(Supreme Court of the United States. 1922. 258 U. S. —, 42 Sup. Ct. 570,
66 L. Ed. —.)

The defendants in the court below were the United Mine Workers of America and its officers, District 21 of the United Mine Workers of America and its officers, 27 local unions in District No. 21 and their officers, and 65 individuals, mostly members of one union or another, but including some persons not members, all of whom were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce, in violation of the first and second sections of the Anti-Trust Act (Comp. St. §§ 8820, 8821), and with having, in the course of that conspiracy, and for the purpose of consummating it, destroyed the plaintiff's properties. Treble damages for this and an attorney's fee were asked under the seventh section of the act (Comp. St. § 8829).

Mr. Chief Justice TAFT. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable in their names? ¹¹ * * *

The United Mine Workers of America is a national organization. Indeed, because it embraces Canada, it is called the International Union. Under its constitution, it is intended to be the union of all workmen employed in and around coal mines, coal washers, and coke ovens on the American continent. Its declared purpose is to increase wages and improve conditions of employment of its members, by legislation, conciliation, joint agreements, and strikes. It demands not more than eight hours a day of labor. The union is composed of workmen eligible to membership and is divided into districts, subdistricts, and local unions. The ultimate authority is a general convention to which delegates selected by the members in their local organizations are elected. The body governing the union in the interval between conventions is the International Board, consisting of the principal officers, the president, vice president and secretary-treasurer together with a member from each district. The president has much power. He can remove or suspend International officers, appoints the national organizers and subordinates, and is to interpret authoritatively the constitution, subject to reversal by the International Board. When the Board is not in session, the individual members are to do what he directs them to do. He may dispense with initiation fees for admission of new locals and members. The machinery of the organization is directed largely toward propaganda, conciliation of labor disputes, the making of scale agreements with operators, the discipline of officers, members, districts, and locals, and toward strikes and the maintenance of funds for that pur-

¹¹ Only so much of the statement of facts and of this opinion as relates to the court's dictum on this question is printed.

pose. It is admirably framed for unit action under the direction of the national officers. It has a weekly journal, whose editor is appointed by the president, which publishes all official orders and circulars, and all the union news. Each local union is required to be a subscriber, and its official notices are to be brought by the secretary to the attention of the members. The initiation fees and dues collected from each member are divided between the national treasury, the district treasury, and that of the local. Should a local dissolve, the money is to be transmitted to the national treasury.

The rules as to strikes are important here. Section 27 of the constitution is as follows:

"The Board shall have power between conventions, by a two-thirds vote, to recommend the calling of a general strike, but under no circumstances shall it call such strike until approved by a referendum vote of the members."

Under article 16, no district is permitted to engage in a strike involving all or a major portion of its members without sanction of the International Convention or Board.

Section 2 of that article provides that districts may order local strikes within their respective districts "on their own responsibility," but where local strikes are to be financed by the International Union they must be sanctioned by the International Board.

Section 3 provides that in unorganized fields the convention or Board must sanction strikes, and no financial aid is to be given until after the strike has lasted four weeks, unless otherwise decided by the Board. The Board is to prescribe conditions in which strikes are to be financed by the International Union and the amount of strike relief to be furnished the striking members. In such cases, the president appoints a financial agent to assume responsibility for money to be expended from the International funds, and he only can make binding contracts. There is a uniform system of accounting as to the disbursements for strikes.

The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in traveling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.

Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind.

421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; *Baskins v. United Mine Workers* (Ark.) 234 S. W. 464, decided Nov. 7, 1921. But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trade-mark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the states, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. We insert in the margin an extended reference, furnished by the industry of counsel, to legislation of this kind. More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued (*Story, Equity Pleadings* [8th. Ed.] §§ 94, 97; *St. Germain v. Bakery Union*, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F, 824; *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354; *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. [N. S.] 1150, 122 Am. St. Rep. 129); and this has had its influence upon the law side of litigation, so that out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported, in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide territory, industrial controversies, and strikes out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members, to recover damages and to levy on his share of the strike fund, would be to leave them remediless.

In the case of *Taff Vale Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, an English statute provided for the registration of trades unions, authorized them to hold property through trustees, to have agents, and provided for a winding up and a rendering of accounts. A union was sued for damages growing out of a strike. Mr. Justice Farwell, meeting the objection that the union was not a corporation and could not be sued as an artificial person, said:

"If the contention of the defendant society were well founded, the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of action by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents."

He therefore gave judgment against the union. This was affirmed by the House of Lords. The legislation in question in that case did not create trade unions, but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue nor imposed liability to be sued. See also *Hillenbrand v. Building Trade Council*, 14 Ohio Dec. N. P. 628; *Holland Jurisprudence* (12th Ed.) 341; *Pollock's First Book on Jurisprudence* (2d Ed.) 125.

Though such a conclusion as to the suability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose. Trade unions have been recognized as lawful by the Clayton Act; they have been tendered formal incorporation as national unions by the Act of Congress approved June 29, 1886 (24 Stat. 86 [Comp. St. §§ 8908-8912]). In the Act of Congress approved August 23, 1912 (37 Stat. 415 [Comp. St. §§ 8913-8917]), a commission on industrial relations was created, providing that three of the Commissioners should represent organized labor. Transportation Act 1920, §§ 302-307 (41 Stat. 469), recognizes labor unions in creation of railroad boards of adjustment, and provides for action by the Railroad Labor Board upon their application. The Act of Congress approved August 5, 1909, c. 6, § 38, 36 Stat. 112, and the Act approved October 3, 1913, c. 16, subd. G, (a) (38 Stat. 172), expressly exempt labor unions from excise taxes. Periodical publications issued by or under the auspices of trades unions are admitted into the mails as second-class mail matter. Acts 1911-1913, c. 389 (37 Stat. 550 [Comp. St. § 7309]). The legality of labor unions of postal employees is expressly recognized by Act of Congress approved August 24, 1912, c. 389, § 6 (37 Stat. 539, 555 [Comp. St. § 3287]). By Act of Congress passed August 1, 1914, no money was to be used from funds therein appropriated to prosecute unions under the Anti-Trust Act (38 Stat. 609, 652).

In this state of federal legislation, we think that such organizations

are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. The fact that the Supreme Court of Arkansas has since taken a different view in *Baskins v. United Mine Workers of America*, *supra*, cannot, under the Conformity Act operate as a limitation on the federal procedure in this regard.

Our conclusion as to the suability of the defendants is confirmed in the case at bar by the words of sections 7 and 8 of the Anti-Trust Law (Comp. St. §§ 8829, 8830). The persons who may be sued under section 8 include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." This language is very broad, and the words given their natural signification certainly include labor unions like these. They are, as has been abundantly shown, associations existing under the laws of the United States, of the territories thereof, and of the states of the Union. Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any persons or combinations of persons should escape its application. Their thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions recognized by the statutes of the United States or the states or the territories, or foreign countries as lawfully existing; and this, of course, includes labor unions, as the legislation referred to shows. Thus it was that in the cases of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and *Eastern States Lumber Association v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, unincorporated associations were made parties to suits in the federal courts under the Anti-Trust Act without question by any one as to the correctness of the procedure.

For these reasons, we conclude that the International Union, the District No. 21, and the 27 local unions were properly made parties defendant here and properly served by process on their principal officers.¹²

¹² Judgment below for the plaintiffs was reversed on other grounds.

KEOGH v. CHICAGO & N. W. RY. CO.

(Supreme Court of the United States, 1922. 258 U. S. —, 43 Sup. Ct. 57, 67 L. Ed. —.)

Mr. Justice BRANDEIS delivered the opinion of the court.

This action, under section 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 8829), was brought by Keogh in the federal District Court for Northern Illinois, Eastern Division, in November, 1914. Eight railroad companies and twelve individuals were made defendants. The case was heard upon demurrer to a special plea; the demurrer was overruled; judgment was entered for defendants, plaintiff electing to stand upon his demurrer; and this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. 271 Fed. 444. The case is here on writ of error.

The cause of action set forth was this: Keogh is a manufacturer of excelsior and flax tow at St. Paul, Minn. The defendant corporations are interstate carriers engaged in transporting freight from St. Paul to points in other states. Prior to September 1, 1912, these carriers formed an association known as the Western Trunk Line Committee. The individual defendants are officers and agents of the carriers and represent them in that committee. It is a function of the committee to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers. By means of such agreement, competition as to interstate rates from St. Paul on excelsior and tow was eliminated, uniform rates were established, and interstate commerce was restrained. The uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates would have been, if competition had not been thus eliminated. Through this agreement for uniform rates Keogh was damaged. The declaration contains a schedule of the amounts paid by him in excess of those which would have been paid under rates prevailing before September 1, 1912, and which, but for the conspiracy, would have remained in effect. He claims damages to the extent of this difference in rates. He also alleges as an item of damages that the increase in freight rates lessened the value of his St. Paul factory through loss of profits.

Defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation, upon complaint of Keogh, pursuant to the Act to Regulate Commerce of February 4, 1887, c. 104, § 15, 24 Stat. 379, 384, as amended (Comp. St. § 8583); that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that they were not made effective until after they had been so approved. The character of the proceedings before the Commission was

more fully shown by reference to *Keogh v. Chicago, Burlington & Quincy R. Co.*, 24 Interst. Com. Com'n R. 606; also *Rates on Excelsior and Flax Tow from St. Paul, Minn.*, 26 Interst. Com. Com'n R. 689; *Rates on Excelsior and Flax Tow from St. Paul, Minn.*, 29 Interst. Com. Com'n R. 640; *Morris, Johnson, Brown, Manufacturing Co. v. Illinois Central R. Co.*, 30 Interst. Com. Com'n R. 443; *The Excelsior and Flax Tow Cases*, 36 Interst. Com. Com'n R. 349.

The case is presented on these pleadings. Whether there is a cause of action under section 7 of the Anti-Trust Act is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the Act to Regulate Commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates; and that, as he has been damaged thereby, he is entitled to recover. The instrument by which Keogh is alleged to have been damaged are rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one or more of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce struggle for business, established unremunerative rates. Since the case arose prior to Transportation Act of February 28, 1920, c. 91, § 418, 41 Stat. 474, 485, the carriers were at liberty to establish or maintain even unreasonably low rates, provided they were not discriminatory. Compare *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 277, 12 Sup. Ct. 844, 36 L. Ed. 699; *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 565, 39 Sup. Ct. 375, 63 L. Ed. 772.

All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319. But under the Anti-Trust Act a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and, if so, the government may have redress by criminal proceedings under section 3 (Comp. St. § 8822), by injunction under section 4 (Comp. St. § 8823), and by forfeiture under section 6 (Comp. St. § 8828). That was settled by *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government. It does not, however, follow that Keogh, a private shipper, may recover damages under section 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot.

A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What

rates are legal is determined by the Act to Regulate Commerce. Under section 8 of the latter act (Comp. St. § 8572) the exaction of any illegal rate makes the carrier liable to the "persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable attorney's fee. Sections 9 and 16 (Comp. St. §§ 8573, 8584) provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 37 Sup. Ct. 120, 61 L. Ed. 305. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker v. Lehigh Valley R. Co.* (C. C.) 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?

Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Louisville & Nashville R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Atchison, Topeka & Santa Fé Ry. Co. v. Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Dayton Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 239 U. S. 446, 36 Sup. Ct. 137, 60 L. Ed. 375; *Erie R. Co. v. Stone*, 244 U. S. 332, 37 Sup. Ct. 633, 61 L. Ed. 1173. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577, 40 Sup. Ct. 27, 63 L. Ed. 1151. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under section 7. Uniform treatment would not result, even if all sued, un-

less the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

The character of the issues involved raises another obstacle to the maintenance of the action. The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action. * * * But it is the Commission which must determine whether a rate is discriminatory; at least, in the first instance. See *Abilene Case*, *supra*; *Great Northern Ry. Co. v. Merchants' Electric Elevator Co.*, 259 U. S. —, 42 Sup. Ct. 477, 66 L. Ed. —. * * * The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be, discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination.¹³ And that hypothetical question is one with which plaintiff would necessarily be confronted at a trial.

Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222–224, 34 Sup. Ct. 853, 58 L. Ed. 1284); but the damages alleged are purely speculative. Under section 7 of the Anti-Trust Act, as under section 8 of the Act to Regulate Commerce (*Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315), recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. [Compare *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Motion Picture Patents Co. v. Eclair Film Co.* (D. C.) 208 Fed. 416; *Locker v. American Tobacco Co.*, 218 Fed. 447, 134 C. C. A. 247; *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 79, 143 C. C. A. 353; *Noyes v. Parsons*, 245 Fed. 689, 158 C. C. A. 91.] To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co. v. Darnell-Taenzar Co.*, 245 U. S. 531, 38 Sup. Ct. 186, 62 L. Ed. 451. Here the instrument by which the damage is alleged to have

¹³ A part of the discussion of this point is omitted.

been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Affirmed.

APPENDIX

1. The Sherman Anti-Trust Act.
 2. The Federal Trade Commission Act.
 3. The Clayton Act.
 4. The Webb Act.
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THE SHERMAN ANTI-TRUST ACT

Approved July 2, 1890

[Chapter 647, 26 Stat. 209 (U. S. Comp. St. §§ 8820-8823, 8827-8830)]

An act to protect trade and commerce against unlawful restraints and monopolies.

Section 1. Every contract combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which

the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.¹

THE FEDERAL TRADE COMMISSION ACT

Approved September 26, 1914

[Chapter 311, 38 Stat. 717 (U. S. Comp. St. §§ 8836a-8836k)]

An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commissioner shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

Sec. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special ex-

¹ The Sherman Act (26 Stat. 209) itself has not been amended, but appropriations for the fiscal years ending June 30, 1920 and 1921 (Sundry Civil Appropriation Act July 19, 1919, c. 24, par. 1, 41 Stat. 163, and Sundry Civil Appropriation Act June 5, 1920, c. 235, par. 1, 41 Stat. 874, respectively) were made contingent upon no part of the moneys being "spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours or bettering the conditions of labor, or for any act done in furtherance thereof, not in itself unlawful: Provided further, that no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products."

perts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The auditor for the State and other Departments shall receive and examine all accounts of expenditures of the commission.

Sec. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, paper, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sec. 4. That the words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this act.

"Acts to regulate commerce" means the act entitled "An act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all acts amendatory thereof and supplementary thereto.

"Anti-trust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-

seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen.

Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a Circuit Court of Appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that

the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either house of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations, and to make rules and regulations for the purpose of carrying out the provisions of this act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Sec. 8. That the several departments and bureaus of the government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this act, and shall detail from time to time such officials and employees to the commission as he may direct.

Sec. 9. That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the District Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the District Courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as heretofore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, that no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Sec. 11. Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust acts or the acts to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said anti-trust acts or the acts to regulate commerce or any part or parts thereof.

THE CLAYTON ACT

Approved October 15, 1914

[Chapter 323, 38 Stat. 730 (U. S. Comp. St. §§ 1243a-1243d, 1245a-1245e, 8602a, 8835a-8835p)]

An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that "anti-trust laws," as used herein, includes the act, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this act.

"Commerce," as used herein, means trade or commerce among the several states and with foreign nations, or between the District of Columbia or any territory of the United States and any state, territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any state or territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any territory or any insular possession or other place under the jurisdiction of the United States: Provided, that nothing in this act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, that nothing herein contained shall prevent discrimination in prices between purchasers of commodities on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, this section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further, this section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about,

or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, that nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Sec. 8. That from and after two years from the date of the approval of this act no person shall at the same time be a director or other officers or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a state, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: Provided, that nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: Provided further, that a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any state where the entire capital stock of one is owned by stockholders in the other: And provided further, that nothing contained in this section shall forbid a director of class A of a Federal Reserve Bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating

more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Sec. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the District Court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution hereunder for the same act or acts.

Sec. 10. That after two years from the approval of this act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the

Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

Sec. 11. That authority to enforce compliance with sections two, three, seven and eight of this act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such

additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 12. That any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Sec. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: Provided, that in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

Sec. 14. That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon

conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

Sec. 15. That the several District Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damages is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Sec. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Sec. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Sec. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sec. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any District Court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sec. 22. That whenever it shall be made to appear to any District Court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and

place fixed by the court: Provided, however, that if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers, may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months: Provided, that in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

Sec. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any District Court of the United States or any court of the District of Columbia.

Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this act, may be punished in conformity to the usages at law and in equity now prevailing.

Sec. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this act.

Sec. 26. If any clause, sentence, paragraph, or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not effect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

THE WEBB ACT

Approved April 10, 1918

[Chapter 50, 40 Stat. 516 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 8836¼c-8836¼e)]

An act to promote export trade, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the words "export trade" wherever used in this act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

That the words "trade within the United States" wherever used in this act mean trade or commerce among the several states or in any territory of the United States, or in the District of Columbia, or between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or between the District of Columbia and any state or states.

That the word "association" wherever used in this act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

Sec. 2. That nothing contained in the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

Sec. 3. That nothing contained in section seven of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain or substantially lessen competition within the United States.

Sec. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Sec. 5. That every association now engaged solely in export trade, within sixty days after the passage of this act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and all of its stockholders or

members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this act, and it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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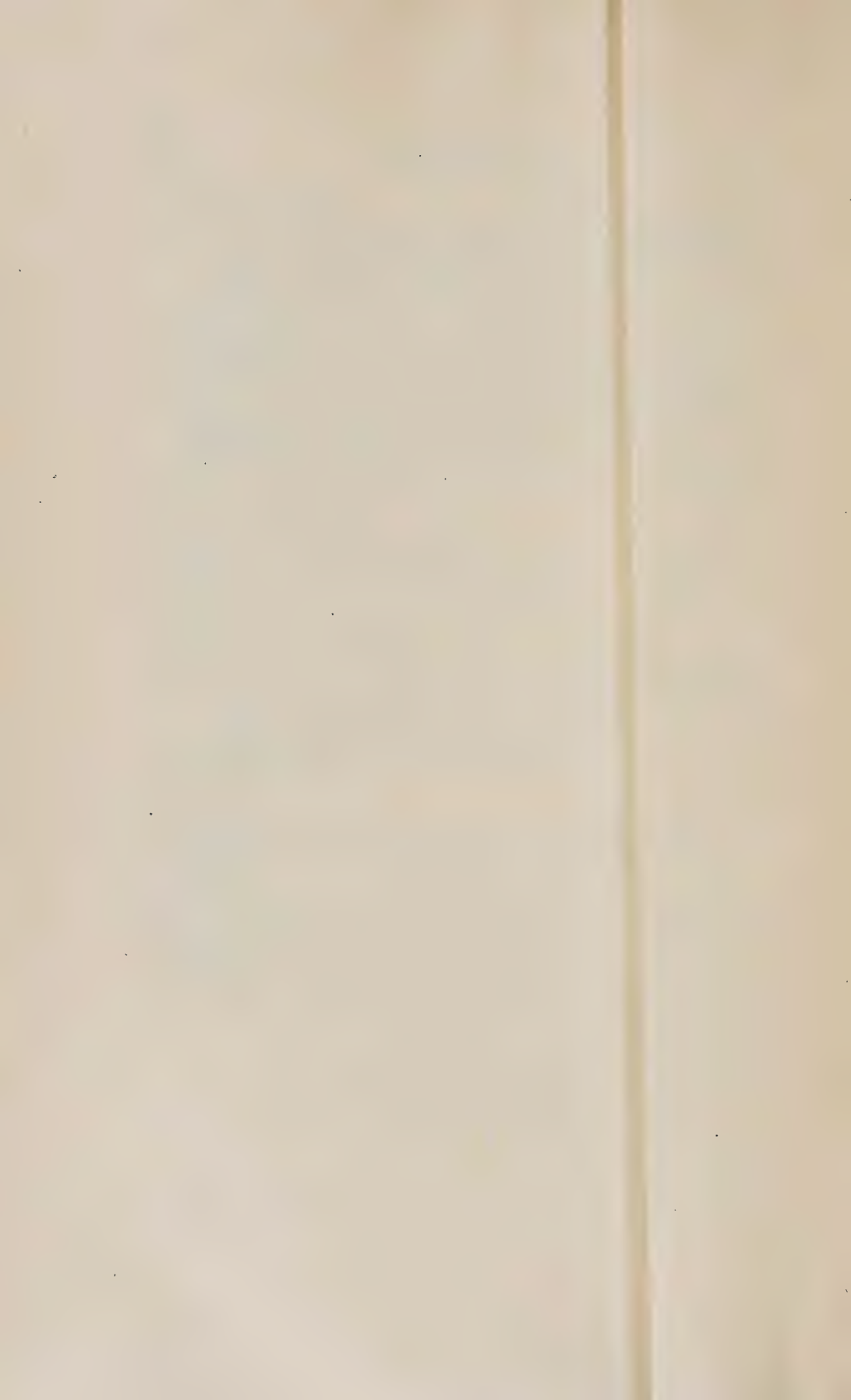
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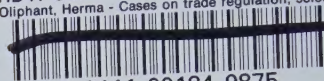
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